Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

ANTHONY G. VASEK,

*Petitioner,*

v.

MT. SAN JACINTO COLLEGE DISTRICT et al.,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The California Court Of Appeal**
**Fourth Appellate District, Division Two**

## PETITION FOR WRIT OF CERTIORARI

ANTHONY G. VASEK
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10695

## QUESTION PRESENTED FOR REVIEW

DOES THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AFFORD A LOCAL CALIFORNIA COMMUNITY COLLEGE DISTRICT IMMUNITY FROM A 42 U.S.C. §1983 SUIT?

## LIST OF ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THE COURT BELOW

Plaintiff/Appellant and Petitioner ANTHONY G. VASEK, *In Pro Per*

### Parties Who, Petitioner Believes, Have An Interest In The Outcome Of The Petition

Defendants/Respondents MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT, a public entity (erroneously sued and served as MT. SAN JACINTO COLLEGE DISTRICT), MT. SAN JACINTO COLLEGE DISTRICT BOARD OF TRUSTEES, and MT. SAN JACINTO COLLEGE DISTRICT ACADEMIC SENATE, organizational units related to a public entity

Attorneys of Record: Walsh & Declues
and Dennis J. Walsh

### Parties Who, Petitioner Believes, Have No Interest In The Outcome Of The Petition

Defendants/Respondents BOBBY AVILA, LAWRENCE BARKLEY, DAVID BOOKIN, CLAIRE BROYLES, BENTON CALDWELL, BERNARD J. CARRIGAN, ALICE CUTTING, BENJAMIN DAVIS, WILLIAM FARRELL, ELGIN HUSHBECK, EUGENE KADOW, MARCIA L. KRULL, RICHARD H. LOWE, ROBERT McNERNEY, ANN MOTTE, JOHN MOTTE, STEVE NARIN, KAZI NIZAMUDDIN, SHAHLA RAZAVI, KELLY ROBERTS, ROBERT G. ROCKWELL, DON ROHRABACHER, GWENDOLYN SCHLANGE, ROBERT SCHLEY, JOHN SEED, RICHARD SISK, KARL SPARKS, WAYNE

**LIST OF ALL PARTIES AND THEIR ATTORNEYS OF RECORD IN THE COURT BELOW** - Continued

STUART, MICHAEL TAUSIG, WALLY UPPER, M. ANNE WALKER, and WAYNE WEBB, employees of a public entity

Attorneys of Record: Walsh & Declues and Dennis J. Walsh

Defendant/Respondent KEENAN & ASSOCIATES

Attorneys of Record: Briskin, Latzanich & Pene

Defendant/Respondent RIVERSIDE COUNTY OFFICE OF EDUCATION

Attorneys of Record: McCune & Harber

Defendants/Respondents RONALD C. RUUD, SHERRY G. GORDON, and LAW FIRM OF ATKINSON, ANDELSON, LOYA, RUUD & ROMO

Attorneys of Record: Atkinson, Andelson, Loya, Ruud & Romo

Defendant/Respondent ROY B. MASON

Attorneys of Record: Chapin, Shea, McNitt & Carter

Defendant/Respondent ROYCE LAPP

Attorneys of Record: Gilbert, Kelly, Crowley & Jennett

Defendants/Respondents ACADEMIC SENATE FOR CALIFORNIA COMMUNITY COLLEGES, CHANCELLOR'S OFFICE FOR CALIFORNIA COMMUNITY COLLEGES, BOARD OF GOVERNORS FOR CALIFORNIA COMMUNITY COLLEGES, KAREN SUE GROSZ, and PHIL HARTLEY

Attorneys of Record: Office of the Attorney General of the State of California

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## PETITION FOR WRIT OF CERTIORARI

Plaintiff/Appellant and Petitioner Anthony G. Vasek (hereinafter "Vasek") respectfully requests that a writ of certiorari issue to review the opinion filed on October 4, 2001, by the California Court of Appeal, Fourth Appellate District, Division Two, in the above-entitled case.

## DECISIONS BELOW

*Anthony G. Vasek v. Mt. San Jacinto College District et al.*, Unpublished Opinion, California Court of Appeal, Fourth Appellate District, Division Two, Master Case No. E017343, filed October 4, 2001, reprinted in the Appendix (App. 1-71).

*Anthony G. Vasek v. Mt. San Jacinto College District et al.*, Unpublished Order Denying Petition for Rehearing, California Court of Appeal, Fourth Appellate District, Division Two, Master Case No. E017343, filed October 24, 2001, reprinted in the Appendix (App. 72).

*Anthony G. Vasek v. Mt. San Jacinto College District et al.*, Unpublished Order of Dismissal, California Superior Court of Riverside County, Case No. 254638, filed September 5, 1995, reprinted in the Appendix (App. 73-80).

*Anthony G. Vasek v. Mt. San Jacinto College District et al.*, Unpublished Order Denying Petition for Review, Supreme Court of California, Case No. S102022, filed January 16, 2002, reprinted in the Appendix (App. 81).

## BASIS FOR THIS COURT'S JURISDICTION

On January 16, 2002, the Supreme Court of California denied Vasek's petition for discretionary review. This Court, therefore, now possesses jurisdiction under 28 U.S.C. §1257(a).

## APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District

of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE AND FACTS

Vasek has been employed as a full-time faculty member in engineering and mathematics by Defendant/Respondent Mt. San Jacinto Community College District (hereinafter "the College District") since 1987. At the time he was hired, Vasek held lifetime California credentials in engineering, mathematics, physics, and business administration and possessed the degrees: Bachelor of Arts in Mathematics-Physics, Bachelor of Aeronautical Engineering, Master of Science in Engineering, Master of Business Administration, and Doctor of Engineering.

During Vasek's employment, defendants conspired to retaliate against him for voicing opposition to both the classification of the College District's vocational drafting technology program as a transfer program in engineering, and his teaching assignment in the program, for which he was neither credentialed nor qualified. Under the guise of disciplining a disruptive and unprofessional employee, the College District subjected Vasek to various disciplinary measures and deprived him of certain benefits of his employment.

On April 20, 1989, the College District, in concert with certain defendants, filed a disciplinary memorandum against Vasek advising him against continued unprofessional conduct and threatening him with further disciplinary action. The memorandum reprimanded Vasek for criticizing the vocational drafting program and

the college administration during a meeting with vocational drafting instructors.

During a meeting of the College District's Academic Senate in March 1990, Vasek proposed, and the members approved, an independent investigation into the College District's administration. Before any investigation took place, the College District replaced the current members of its Academic Senate with interim members. At about this time, when Vasek wrote an open letter of criticism concerning the College District's actions, the College District and other defendants placed Vasek on administrative leave. While Vasek was on administrative leave, the College District and its officials, in concert with certain State officials, cancelled all efforts to investigate Vasek's complaints.

After retaining attorneys to investigate Vasek's conduct, the College District repeatedly reprimanded Vasek and even threatened dismissal. In one of the letters of reprimand, the College District and other defendants criticized Vasek for attending a rally in an attempt to gain student support.

In April of 1993, the College District's Academic Senate determined that Vasek did not possess a valid credential to teach the vocational drafting program. The College District, however, disagreed with its Academic Senate and continued Vasek's assignment in the program. Vasek sent to the College District's Academic Senate a memorandum contesting the College District's continued placement. In August of 1993, the College District reassigned Vasek to teaching only remedial mathematics courses through college algebra.

In 1994, the College District's Advisory Committee for the Drafting Technology Program, composed of professionals employed in industry, sided with Vasek by issuing a letter stating that none of the College's courses whose titles contain the word "engineering" represented legitimate counterparts of similarly titled core engineering courses at the university level. The College District responded by prohibiting Vasek from addressing that committee further.

When Vasek would not cease complaining about his mistreatment, the College District and other defendants intensified their repressive measures against him and, among other things, conspired to deprive him of certain benefits of his employment. Included among these deprivations were the following: the withholding of teaching assignments in engineering and advanced mathematics; the suspension of Vasek's seniority, rank and tenure; the refusal to approve favorable teaching schedules; and the denial of participation in certain flex activities. All of these measures were taken against Vasek in violation of standard practice as applied to other faculty.

In view of what he was experiencing, Vasek expressed his concerns at a general meeting of the faculty and administration held on January 19, 1995. He was abruptly directed to stop speaking by an official of the College District who, upon the advice of Attorney Defendants, subsequently filed against Vasek a formal reprimand. The contents of that reprimand were then incorporated into the more than 40 charges for dismissal later brought by the College District against Vasek.

In a further effort to diminish Vasek's influence over curricular matters, the College District, by and through certain of its officials, subsequently encouraged a student to file unfounded charges against Vasek, based upon his alleged misconduct in the classroom, and then convened a formal hearing committee to hear the student's complaint. Vasek did not learn of the filing of the request for a hearing before a formal hearing committee, the formation of the hearing committee, its conduct of a hearing in his absence, and its finding against him until well after the fact. The matters pertaining to the student's charges against Vasek were later incorporated into the more than 40 charges for dismissal brought by the College District against Vasek.

The retaliatory measures taken against Vasek reached such proportions that, when Vasek's father died in the Fall of 1995, the College District filed formal reprimands against Vasek even though he had informed the District of the nature of his absence by submitting the appropriate paperwork. The reprimands: 1) rejected Vasek's submissions because they purportedly did not follow the standard absence reporting procedure and 2) charged him with refusing to obey school regulations. This, then, was used as evidence of Vasek's unprofessional conduct, evident unfitness for service, and persistent violation of or refusal to obey school laws or regulations in a Notice to Correct Deficiencies served upon Vasek in November of 1995.

The College District's mistreatment of Vasek culminated in the bringing of more than 40 unfounded charges for dismissal against Vasek, in June of 1996, based on the Notice to Correct Deficiencies served upon him in

November of 1995. Vasek was exonerated of all charges in a trial conducted by the California Office of Administrative Hearings in 1997; and he continues to serve, to this day, on the full-time faculty of the College as a tenured Full Professor of Engineering/Mathematics.

On August 26, 1994, frustrated by the faculty union's unwillingness to defend him against the ever escalating mistreatment he was experiencing, Vasek brought in the Superior Court of Riverside County of the State of California a negligence suit against the union and a 42 U.S.C. §1983 action against District Defendants and their co-conspirators. (App. 3-4) The case was eventually dismissed as to all parties on motions and demurrers by the defendants. No trial was ever had. (App. 4-9)

Vasek filed three consolidated appeals from the trial court's judgments in favor of the defendants. In these appeals, Vasek raised the following claims: the trial court abused its discretion in denying Vasek's request for a continuance; the court was disqualified from presiding over Vasek's case; the court erred in sustaining defendants' demurrers; the court erred in denying Vasek's motion to stay the proceedings pending the first appeal; the court erred in granting State-related Defendants' motion for summary judgment and motion for judgment on the pleadings; and the court erred in granting Defendant Lapp's motion to strike. Briefs were filed by all parties to the appeals; and on October 4, 2001, the California Court of Appeal, Fourth Appellate District, Division Two, filed its opinion in the case. (App. 1-3)

In its opinion, the California Court of Appeal held that Vasek had indeed stated a valid 42 U.S.C. §1983 cause of action against all of the individual defendants named, the law firm representing the College District, and the College District's insurance broker. Based upon that holding, therefore, the Court of Appeal reversed the trial court's orders dismissing the case as to said defendants. The Court of Appeal, however, affirmed the trial court's judgment of dismissal based upon the trial court's order sustaining the College District's demurrer as to the District and its officials acting in their official capacities. (App. 70-71)

In a timely filed petition for rehearing, Vasek challenged the appellate court's bestowal of state immunity upon the College District. The Court of Appeal, however, denied the petition in an order filed on October 24, 2001. (App. 72) Vasek thereupon filed a timely petition for review that the Supreme Court of California denied in an order filed on January 16, 2002. (App. 81) Vasek now respectfully petitions this Court to review the California Court of Appeal's bestowal of state immunity upon the College District.

## ARGUMENTS IN SUPPORT OF REVIEW

The California Court of Appeal noted in its opinion that, although local governmental entities are "persons" under section 1983, states and state officials acting in their official capacities are not. "The question, therefore, is whether a school district and its related entities are state agencies for purposes of section 1983." The Court

noted further that "this court addressed the exact question in our recent case, *Kirchmann v. Lake Elsinore Unified School District.*" (App. 24-25) Then, without making any attempt to analyze the specific circumstances of the *Vasek* case, the Court summarily decided that the College District in the *Vasek* case was not a "person" for purposes of section 1983 based solely on its decision in *Kirchmann.* (App. 26) This petition, therefore, necessarily focuses on the *Kirchmann* decision.

In 2001, Norma Kirchmann petitioned this Supreme Court to review the decision in *Kirchmann v. Lake Elsinore Unified School District* (2000), 83 Cal. App. 4th 1098 [100 Cal. Rptr. 2d 289, 147 Ed. Law Rep. 224], and this Court denied her request. Vasek's petition for a writ of certiorari, however, is markedly different from Norma Kirchmann's. As hereinafter more fully appears, Vasek's petition advances compelling reasons for review, based on a completely different set of circumstances and legal principles, that were not advanced by Norma Kirchmann.

## I

## THE CALIFORNIA RULING IS A GROUNDBREAKING DECISION THAT DEPARTS SIGNIFICANTLY FROM OTHER FEDERAL DECISIONS.

"To our knowledge, no previous decision has considered the precise question here, whether a California school district should be considered a local governmental body subject to suit under section 1983, or an instrumentality of the state exempt from suit." (*Kirchmann v. Lake Elsinore Unified School District, supra* at 1101.)

### A. The California Decision Conflicts with the U.S. Supreme Court's Holding That Section 1983 Exemptions Based on a State's Own Legal Heritage Are Impermissible.

Citing *Mt. Healthy City Board of Education v. Doyle* (1977), 429 U.S. 274, the U.S. Supreme Court stated in *Missouri v. Jenkins* (1990), 495 U.S. 33 at 56, fn. 20:

> "[T]he Eleventh Amendment . . . does not afford local school boards . . . immunity from suit . . . ."

The *Kirchmann* court unabashedly noted "that most courts after *Mt. Healthy* have declined to extend Eleventh Amendment immunity to local school districts and boards." The *Kirchmann* court further noted that, after *Missouri v. Jenkins*, "[l]ower federal courts, and state courts, have reached the same conclusion." (*Kirchmann v. Lake Elsinore Unified School District, supra* at 1106-1107.) Nevertheless, relying entirely upon California's legislative and judicial heritage, the California Court of Appeal in the *Kirchmann* and *Vasek* cases chose to reach an *opposite* conclusion, extending Eleventh Amendment immunity to California school districts and boards.

To the extent that the California Court of Appeal's decision reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law. (*Howlett v. Rose* (1990), 496 U.S. 356 at 377-378.) "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of

action." (*Wilson v. Garcia* (1985), 471 U.S. 261 at 269.) In the end, the *Howlett* court concluded at 383:

> " . . . as to persons that Congress subjected to liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage. If we were to uphold the immunity claim in this case . . . States would then be free to nullify for their own people the legislative decisions that Congress has made on behalf of all the people."

This Supreme Court should grant review to determine whether the California Court of Appeal's reasoning in *Kirchmann* is consistent with the principles enunciated by this Court.

### B. The California Decision Conflicts with the U.S. Tenth Circuit Court of Appeals' Decision in a Similar Case.

In *Duke v. Grady Municipal Schools* (10th Cir. 1997), 127 F.3d 972, the Tenth Circuit Court addressed the identical question raised in *Kirchmann*. However, despite the fact that the school systems described in *Duke* and *Kirchmann* are very similar and that the factors considered by the two courts were essentially the same, the two courts nevertheless reached diametrically different conclusions.

A reading of *Duke* reveals that "a clear and workable test in this very confused area of the law" is desperately needed. (*Duke v. Grady Municipal Schools, supra* at 981.) This Supreme Court should grant review to resolve the confusion.

### C. The California Decision Conflicts with the U.S. Ninth Circuit Court of Appeals' Holding That a Grant of Immunity in One Case Does Not Necessarily Translate into a Grant of Immunity in Another Case Just Because the Entity Involved Is Similar or Even Identical.

In *Doe v. Lawrence Livermore National Laboratory* (9th Cir. 1995), 65 F.3d 771, the Ninth Circuit Court held that a grant of immunity in one case does not necessarily translate into a grant of immunity in another case just because the entity involved is similar or even identical. Rather, a separate analysis must be performed in each case to determine whether a grant of immunity is appropriate. The Ninth Circuit Court specifically found

> " . . . that the University is not protected by the Eleventh Amendment . . . because the University, *in this particular instance,* is not functioning as an arm of the state. Because we hold that the University is not an arm of the state *in this instance,* it is a 'person' under section 1983."
>
> (*Ibid.* at 776; emphasis is added.)

By contrast, the California Court of Appeal applied *Kirchmann* to the *Vasek* case as a blanket rule without regard for any distinctions that might exist between the two cases.

The *Vasek* case is the first in California appellate history to allege a section 1983 cause of action based upon administrative interference with *a faculty member's ability to engage in the normal academic discourse that is absolutely fundamental to the principal function of an educational institution.* The *Kirchmann* case, on the other hand, involved no such fundamental issues but instead dealt

with issues that were, at best, tangential to the workings of an educational institution. Norma Kirchmann was a *secretary* who was suspended for 30 days after she anonymously communicated to bidders her view that a *conflict of interest existed in the bidder selection process.*

Vasek submits that, even if *arguendo* the *Kirchmann* case were deemed to have been properly decided under the circumstances presented there, those circumstances differ vastly from those presented in the *Vasek* case. Vasek submits that a properly conducted analysis of the differences between the *Vasek* and *Kirchmann* cases would have demonstrated that the College District in the *Vasek* case is not protected by the Eleventh Amendment because the District, *in that particular instance,* was not functioning as an arm of the state; and so, *in that particular instance,* was not a "person" under section 1983.

This Supreme Court should grant review to resolve the conflict between the *Kirchmann* court's decision to categorically immunize every public educational institution in California as an "arm of the state," regardless of the specific circumstances, and that rendered by the Ninth Circuit Court in *Doe v. Lawrence Livermore Laboratory, supra,* which permits certain section 1983 suits to be brought against those same educational institutions.

## II

## THE CALIFORNIA RULING IS A GROUNDBREAKING DECISION THAT PRESENTS A PUBLIC POLICY QUESTION OF IMMENSE IMPORT.

While state involvement in the *funding and operation* of a public education system may be necessary and even

encouraged, no one disputes the fact that, under our system of government, a state agency is constitutionally barred from marshalling its resources and powers to forcibly impose "state approved" ideas upon an unwilling recipient. Indeed, history has shown that, whenever a state was given powers to shape thought (*e.g.*, through a national religion, a national press, or a nationally imposed ideological school of thought), it has invariably led to indoctrination and repression rather than education.

Mindful of this lesson and of what transpires in totalitarian states, we as a nation have *never* permitted our government to control the hearts and minds of the populace through a state newspaper, state radio station, or state television station. Given that no newspaper, radio or television station exerts more influence on an individual's mind than a school, it is appropriate for the public to question whether, within the context of our system of government and our entire national history, there can ever be a school district that is an "arm of the state." But even if *arguendo* one were to deem a school district to be imbued with the authority and status of the state under certain circumstances, logic dictates that the school district would, by definition, immediately cease to function as an "arm of the state" the instant it performed an act which lay outside the purview of the state under the Constitution.

In the *Vasek* case, the College misrepresented its vocational drafting program as engineering. The misrepresentation was brought to the College's attention by Vasek. Rather than correct the misrepresentation, the College, beginning with its disciplinary memorandum of

April 1989, and for years thereafter, did everything in its power to coerce Vasek into acknowledging that the coursework outlined in the College's vocational drafting program was an adequate substitute for the first two years of an engineering curriculum – something which Vasek knew to be untrue, was unwilling to accept, and refused to endorse. One can argue that to immunize the College District as an "arm of the state" in this instance would break the seal that has insulated the American People from state indoctrination practices since the inception of our democracy.

This Supreme Court should grant review to determine whether the decision taken by the California Court of Appeal to categorically immunize every public educational institution in California as an "arm of the state" reflects sound public policy.

## III

## THIS CASE PRESENTS THE IDEAL VEHICLE FOR REWORKING A VERY CONFUSED AREA OF THE LAW.

As stated earlier, the *Duke* case begs for "a clear and workable test in this very confused area of the law." (*Duke v. Grady Municipal Schools, supra* at 981.) This confusion can be abated only if the standards presently employed by the courts are thoroughly and critically re-examined.

In trying to decide whether a public educational institution is functioning as an arm of the state, the courts currently rely primarily on an examination of the institution's potential legal liability and the concomitant impact

that such exposure would have on the state's treasury. The *Vasek* case suggests that this approach may be misguided and begs the question: Should the protection of the state treasury ever have precedence over the protection of academic freedom and the intellectual autonomy of a public educational institution? In other words, do state sovereignty considerations override the First Amendment? Vasek suggests that the answer is no; and a close examination of the circumstances in the *Vasek* case suggests the same.

In *Howlett v. Rose, supra,* this Court had an opportunity to decide definitively whether a school district is a "person" under section 1983 and declined to do so. The Court acted wisely; for, the *Howlett* case, much like the *Kirchmann* case, did not deal with the fundamental workings of an educational institution but instead addressed issues that were, at best, *tangential* to the workings of an educational institution. The *Vasek* case, however, offers this Court the ideal vehicle by which to consider the question; for, the *Vasek* case deals with what is at the heart of an academic institution.

Vasek urges this Court to grant review in this case so that the issue of whether a public educational institution is a "person" under section 1983 can be decided definitively once and for all. The issue is important, and the case is right. It is time.

## SUMMARY AND CONCLUSION

After years of dogged determination during which he was compelled to make court appearances *in propria persona*,[1] Vasek obtained a proper hearing of his case at the California Court of Appeal. Before reaching a final decision in the matter, the Court of Appeal published a tentative opinion and issued a notice stating it had determined that oral argument would aid the decision-making process in the case.

At oral argument (and later in a petition for rehearing), Vasek argued against the bestowal of state immunity upon the College District but was unsuccessful in his effort.[2] He then submitted a timely petition for review which the Supreme Court of California ultimately denied.

Vasek believes the immunity issue was wrongly decided by the California Court of Appeal. Based on the foregoing arguments in support of review, therefore,

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[1] From the very beginning, attorneys were timid about representing Vasek. First, they took note of his own union's unwillingness to take action on his behalf. Second, they took note of Vasek's inability to pursue the matter on anything other than a contingency fee basis. Third, when Vasek filed suit on his own behalf, they took note of the deluge of responsive pleadings and the consistently unfavorable rulings that emanated from the trial court. Fourth, they noted the increasingly expanding size of the record and decided that it was financially infeasible to conduct more than a cursory appraisal of the case. Based on this cursory appraisal, then, each concluded that the case was too complex and too costly to be worth one's while. None envisioned the success that Vasek achieved at the appellate level.

[2] Two of the three justices who decided *Kirchmann* also served on the panel that decided the *Vasek* case.

Vasek respectfully requests that this Supreme Court grant his petition for a writ of certiorari.

While he is well aware that, in some instances, parties *in pro per* have not taken the time to educate themselves adequately on the specific issues at bar, and while he is also aware that, in some instances, parties *in pro per* have even behaved inappropriately in court, Vasek respectfully urges this Court not to be unduly influenced by his appearance *in pro per*. Vasek assures this Court that he has applied himself diligently to the study of the immunity issue, that he is prepared to present well-founded arguments in support of his position, and that he will continue to conduct himself professionally, showing nothing but the utmost respect for this Court at all times.

Respectfully submitted,

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NOT TO BE PUBLISHED

**COURT OF APPEAL, FOURTH DISTRICT**

**DIVISION TWO**

**STATE OF CALIFORNIA**

| | |
|---|---|
| ANTHONY G. VASEK,<br>Plaintiff and Appellant,<br>v.<br>MT. SAN JACINTO COLLEGE DISTRICT et al.,<br>Defendants and Respondents. | E017343 and E020125<br>(Super.Ct.No. 254638)<br>**OPINION**<br>(Filed Oct. 4, 2001) |
| ANTHONY G. VASEK,<br>Plaintiff and Appellant,<br>v.<br>ACADEMIC SENATE FOR CALIFORNIA COMMUNITY COLLEGES et al.,<br>Defendants and Respondents. | E019009<br>(Super.Ct.No. 254638) |

APPEAL from the Superior Court of Riverside County. Stephen D. Cunnison, Judge. Affirmed in part; reversed in part; dismissed in part.

Anthony G. Vasek, in pro. per., for Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, Sherry G. Gordon and John W. Dietrich for Defendants and Respondents.

Bill Lockyer, Attorney General, Silvia M. Diaz, Supervising Deputy Attorney General, and Dana T. Cartozian, Deputy Attorney General, for Defendants and Respondents Academic Senate for California Community Colleges et al.

Briskin, Latzanich & Pene and Katherine B. Pene for Defendant and Respondent Keenan & Associates.

Lynberg & Watkins, Kenton E. Moore and Michael C. Kellar for Defendant and Respondent Riverside County Office of Education.

Walsh & Declues and Dennis J. Walsh for Defendant and Respondent Mt. San Jacinto Community College District et al.

Gilbert, Kelly, Crowley & Jennett, Barbara J. Mandell and Peter J. Godfrey for Defendant and Respondent Royce Lapp.

## 1. Introduction

In an action for retrospective relief against numerous public and private entities and individuals, plaintiff Anthony G. Vasek, a tenured instructor of engineering and mathematics, claimed defendants subjected him to oppressive retaliatory treatment for voicing opposition against Mt. San Jacinto Community College and its vocational drafting program. In three consolidated appeals from the trial court's judgments in favor of defendants, plaintiff raises the following claims: the trial court abused

its discretion in denying plaintiff's request for a continuance; the court was disqualified from presiding over plaintiff's case; the court erred in sustaining the defendants' demurrers; the court erred in denying plaintiff's motion to stay the proceedings pending his first appeal; the court erred in granting the state defendants' motion for summary judgment and motion for judgment on the pleadings; and the court erred in granting defendant Royce Lapp's motion to strike under Code of Civil Procedure section 425.16.

For the reasons provided below, we affirm in part, reverse in part, and dismiss the appeal in part.

## 2. Factual and Procedural History

Plaintiff filed his original complaint on August 26, 1994. After two revisions, plaintiff filed his second amended complaint in December of the same year. In his second amended complaint, plaintiff named the following defendants: Mt. San Jacinto College District, Mt. San Jacinto College District Board of Trustees, Mt. San Jacinto College District Academic Senate (collectively "District"); Mt. San Jacinto College Faculty Association CTA/NEA, California Teachers Association, National Education Association, Mary Ish (collectively "Union"); Riverside County Office of Education ("RCOE"); Academic Senate for California Community Colleges, Chancellor's Office for California Community Colleges, Board of Governors for California Community Colleges, Karen Grosz, Phil Hartley (collectively "State"); Keenan & Associates ("Keenan"); Atkinson, Andelson, Loya, Ruud & Romo, Ronald Ruud, Sherry Gordon (collectively "Attorneys");

and 28 other individual defendants, including Royce Lapp ("Lapp"). Plaintiff's second amended complaint included 14 causes of action, including breach of contract, fraud, defamation, negligence, and conspiracy to deprive plaintiff of various constitutional rights.

Each defendant, except Lapp, demurred to plaintiff's second amended complaint. In ruling on the demurrer filed by District and District officials, the court sustained in part and overruled in part. As to RCOE, State, Attorneys, Keenan, and the other related individual defendants, the trial court sustained their demurrers with leave to amend. As to Union, the court sustained its demurrer without leave to amend. The trial court subsequently entered judgment in favor of Union on April 5, 1995.

On April 24, 1995, plaintiff filed his third amended complaint naming the same defendants, including Union. In this amended complaint, plaintiff added eight additional causes of action and made changes to his existing claims.

In his third amended complaint, plaintiff alleged that, since 1987, he was employed by District as an instructor in engineering and mathematics. During plaintiff's employment, defendants conspired to retaliate against him for voicing opposition to both the classification of District's vocational drafting technology program as a transfer program in engineering, and his teaching assignment in the program, for which he was neither credentialed nor qualified. Under the guise of disciplining a disruptive and unprofessional employee, District subjected plaintiff to various disciplinary measures and deprived plaintiff of certain benefits of his employment.

Plaintiff further alleged that, on April 20, 1989, District, in conjunction with certain District officials and defendant Lapp, filed a disciplinary memorandum against plaintiff advising him against continued unprofessional conduct and threatening him with further disciplinary action. The memorandum reprimanded plaintiff for criticizing the vocational drafting program and the college administration during a meeting with vocational drafting instructors.

During a March 1990 meeting of the Mt. San Jacinto College District Academic Senate ("District Academic Senate"), plaintiff proposed, and the members approved, an independent investigation into District's administration. Before any investigation took place, District replaced the current members of District Academic Senate with interim members. At about this time, when plaintiff wrote an open letter of criticism concerning District's action, District and other defendants placed plaintiff on administrative leave. While plaintiff was on administrative leave, District, District officials, and State officials cancelled all efforts to investigate plaintiff's complaints.

After retaining Attorneys to investigate plaintiff's conduct, District repeatedly reprimanded plaintiff and even threatened dismissal. In one of the letters of reprimand, District and other defendants criticized plaintiff for attending a rally in an attempt to gain student support.

According to plaintiff, in April of 1993, the District Academic Senate determined that plaintiff did not possess a valid credential to teach the vocational drafting

program. District, however, disagreed with District Academic Senate and continued plaintiff's assignment in the program. Plaintiff sent District Academic Senate a memorandum contesting District's continued placement. In August of 1993, District reassigned plaintiff to teaching only remedial mathematics.

Plaintiff alleged that District and other defendants conspired to deprive plaintiff of his constitutional rights. District and other defendants also conspired to deprive plaintiff of certain benefits of his employment, including the following: teaching assignments in engineering and advanced mathematics; seniority, rank, and tenure; favorable teaching schedules; and participation in flex activities. For these deprivations, plaintiff sought compensatory and exemplary damages.

Most defendants, with the exception of defendant Lapp, demurred to plaintiff's third amended complaint.

Because the court previously had entered judgment in favor of Union, the court again sustained Union's demurrer without leave to amend.

At the hearing held on the remaining demurrers, based on the parties' stipulation, the trial court sustained demurrers without leave to amend as to the following defendants: District and District officials; Attorneys; Keenan; and RCOE. The order of dismissal as to these defendants noted that plaintiff opposed each demurrer.

At a subsequent hearing held on State's demurrer, the court sustained the demurrer with leave to amend.

As to defendant Lapp, the court entered a default judgment against him because of his failure to respond to plaintiff's third amended complaint.

On September 27, 1995, plaintiff filed his fourth amended complaint, which contained the same allegations as in his previous complaint, against the only remaining defendant at the time, namely, State.

State demurred to plaintiff's fourth amended complaint. At the hearing on State's demurrer, the court sustained the demurrer without leave to amend as to defendant Chancellor's Office for the California Community Colleges ("Chancellor"), but overruled the demurrer as to the remaining State defendants. The remaining State defendants filed their answers to plaintiff's fourth amended complaint.

At about that time, Lapp filed his motion to set aside the default judgment. On November 28, 1995, the court granted Lapp's motion based on his answer to plaintiff's previous complaint.

Lapp subsequently filed a demurrer to plaintiff's fourth amended complaint. The court sustained the demurrer with leave to amend.

On February 1, 1996, plaintiff filed his fifth amended complaint against defendants State, including Chancellor, and Lapp. Plaintiff's fifth amended complaint contained the same allegations as in his previous complaints, with the exception of an additional cause of action specific to defendant Lapp.

As before, both State and Lapp filed demurrers. After the court overruled State's demurrer in part, the remaining State defendants, excluding Chancellor, filed answers to plaintiff's fifth amended complaint. Although the court also overruled Lapp's demurrer in part, the court sustained his demurrer as to the added 23d cause of action with leave to amend.

On April 16, 1996, plaintiff filed his sixth amended complaint against the following named defendants: State, again including Chancellor; Lapp; and seven new individual District defendants. Plaintiff's sixth amended complaint contained 28 causes of action, including five additional claims against the newly added District defendants.

State filed, and the court sustained, a demurrer to plaintiff's sixth amended complaint as to the fourth cause of action for defamation.

State then filed a motion for summary judgment. Although unclear from the record, the court granted the motion as to the remaining State defendants except the Board of Governors for California Community Colleges ("State Board"). At the same hearing held on State's motion for summary judgment, the court also granted State's motion to strike references to Chancellor in plaintiff's complaint.

Lapp demurred to plaintiff's sixth amended complaint. After the court overruled Lapp's demurrer in part, Lapp filed his answer. Lapp's subsequent efforts to obtain summary judgment were also unsuccessful.

Meanwhile, the new individual District defendants, who were employees of District and members of the Mt. San Jacinto College District Board of Trustees (collectively "District employees"), also filed a demurrer to plaintiff's sixth amended complaint. The court sustained District employees' demurrer with leave to amend.

On August 19, 1996, plaintiff filed his seventh amended complaint against the remaining defendants: State Board, Lapp, and District employees. While State Board filed its answer, Lapp and District employees filed demurrers.

In addition to his demurrer, Lapp filed a motion to strike under Code of Civil Procedure section 425.16. The trial court granted Lapp's motion to strike and dismissed him from the case.

As to District employees, the court sustained their demurrer without leave to amend.

On January 2, 1997, State Board filed a motion for judgment on the pleadings. In granting State Board's motion, the court dismissed the last remaining defendant in plaintiff's case.

### 3. Untimely Appeal

#### A. Union

Plaintiff claims the trial court erred in sustaining Union's demurrer without leave to amend. Because plaintiff failed to appeal timely the court's judgment, as required under rule 2 of the California Rules of Court, we need not reach plaintiff's claim.

After sustaining Union's demurrer, the trial court entered judgment in Union's favor on April 5, 1995. Plaintiff filed his notice of appeal on November 13, 1995. In an order dated June 19, 1997, this court informed plaintiff that his appeal from the court's judgment concerning Union was untimely.[1] "The failure to file a notice of appeal within the applicable time period deprives the appellate court of jurisdiction. [Citation.] Generally, a notice of appeal must be filed on or before '60 days after the date of service of a document entitled "notice of entry" of judgment by any party upon the party filing the notice of appeal[.]' "[2]

Despite his failure to meet the 60-day deadline, plaintiff, in his opening brief, specifically challenges the trial court's ruling as to defendant Union. Absent a timely appeal, this court has no jurisdiction to review the judgment and plaintiff's challenge.[3] We therefore dismiss as untimely plaintiff's appeal of the court's judgment as to defendant Union.

B. Chancellor

On January 3, 1996, the trial court sustained Chancellor's demurrer without leave to amend. Later that month, the court dismissed Chancellor from plaintiff's lawsuit.

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[1] Code of Civil Procedure, section 904.1, subdivision (a); California Rules of Court, rule 2, subdivision (a).

[2] *Maides v. Ralphs Grocery Co.* (2000) 77 Cal.App.4th 1363, 1366-1367.

[3] *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1749.

On March 8, 1996, State served plaintiff with notice of the judgment.

Plaintiff filed his notice of appeal of the court's order granting summary judgment in favor of State Academic Senate, Grosz, and Hartley on August 27, 1996. In his notice of appeal, plaintiff stated that his appeal from the summary judgment would also require review of the trial court's decision to dismiss defendant Chancellor.

In a motion for dismissal to this court, Chancellor claimed that plaintiff's notice of appeal was untimely. In his opposition to Chancellor's motion to dismiss, plaintiff argued that, based on the unity of interests among the State entity defendants, the court's judgment as to Chancellor was merely interlocutory.

In an order dated December 13, 1996, this court reserved ruling on Chancellor's motion for dismissal. In our order, we noted that, "[a]lthough an order of dismissal deciding the plaintiff's rights with respect to one defendant is a separately appealable order, where there is 'such a unity of interest' between the dismissed party and another party who remains in the case, the resolution as to one party may not be final as long as the other remains in the case." Based on our brief discussion below, we now conclude that plaintiff's failure to appeal timely the court's judgment of dismissal prevents him from complaining on appeal.

As stated earlier, the notice of appeal must be filed within 60 days from the date of service of the notice of

entry of judgment.[4] In this case, plaintiff filed his notice of appeal well past the 60-day deadline. Accordingly, this court lacks jurisdiction over the court's judgment as to defendant Chancellor.

Plaintiff nevertheless claims that, because of the interdependency between the State entity defendants, the trial court erred in treating Chancellor differently than the other State defendants. In his reply brief, plaintiff also claims that the court's order of dismissal constituted an interlocutory judgment because the court intended to retain jurisdiction over Chancellor.

During the February 28, 1996, hearing on plaintiff's motion to reconsider the court's dismissal, although the court mistakenly noted that no judgment had yet been entered, the court denied plaintiff's motion, and, therefore, upheld its prior dismissal. A judgment of dismissal operates as final judgment and is separately appealable.[5]

Furthermore, plaintiff fails to show that Chancellor had a "unity of interest" with the other State entity defendants.[6] Even if the three State entities shared control and supervision over the same subject matter, "[d]ifferent public entities have their own liabilities."[7] Liability by the remaining State defendants was not dependent upon or

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[4] California Rules of Court, rule 2, subdivision (a); *Maides v. Ralphs Grocery Co., supra,* 77 Cal.App.4th at pages 1366-1367.

[5] *Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.

[6] See *T & R Painting Construction, Inc. v. St. Paul Fire & Marine Ins. Co.* (1994) 23 Cal.App.4th 738, 743.

[7] See *County of Orange v. FST Sand & Gravel, Inc.* (1998) 63 Cal.App.4th 353, 360.

inextricably intertwined with Chancellor's liability. Plaintiff presents no authority to suggest otherwise.

Therefore, we dismiss plaintiff's appeal of the court's order of dismissal as to defendant Chancellor for lack of jurisdiction.

4. Denial of Motion for Continuance

Plaintiff claims the trial court abused its discretion in denying his motion to continue the hearing on defendants' demurrers to his third amended complaint.

Generally, a party has no right to a continuance as a matter of law.[8] Instead, the trial court exercises wide discretion in determining whether to grant a continuance.[9] On appeal, a trial court's decision will be upheld absent a clear showing of an abuse of discretion.[10]

On August 11, 1995, plaintiff made an oral motion to continue the hearing. Plaintiff explained that he had insufficient time to file oppositions to defendants' demurrers on the following grounds: work-related reprimands and grievances, inadequate time to amend his third amended complaint, difficulty in serving defendant with his third amended complaint, and the initiation of certain

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[8] See *Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170.

[9] See *Mahoney v. Southland Mental Health Associates Medical Group, supra,* 223 Cal.App.3d at page 170; see also *Pham v. Nguyen* (1997) 54 Cal.App.4th 11, 15-17.

[10] See *Foster v. Civil Service Comm.* (1983) 142 Cal.App.3d 444, 448.

administrative claims. After considering plaintiff's reasons, the court noted that plaintiff had knowledge of these problems for some time. The court also noted that no new circumstance existed to justify a continuance. The court then denied plaintiff's motion.

The court did not abuse its discretion. Any problems associated with filing the third amended complaint or completing service of process existed long before the date of the hearing on defendants' demurrers. Based on plaintiff's explanation, the work-related problems apparently occurred during the period of time when plaintiff prepared his third amended complaint. Plaintiff also informed the court that the deadline for filing the administrative complaint was approximately a month before the hearing. Therefore, as noted by the court, no recent or new circumstance justified a continuance.

Moreover, the court previously had granted continuances for the hearing on Keenan and Attorneys' demurrers. At the August 11, 1995, hearing, plaintiff, however, agreed to vacate the court's order granting the prior continuances. Therefore, although plaintiff complains about having inadequate time to respond to numerous demurrers, the only demurrers before the court on August 11, 1995, were the ones filed by RCOE and District.

Furthermore, as noted by Attorneys, the record indicates that the court allotted plaintiff ample time during the proceedings. In response to a previous request for a continuance, the court provided plaintiff with more than double the statutory amount of time.

Plaintiff nevertheless argues that, while he should be held to the same standards as a lawyer, the court should have accommodated his lack of legal training. Contrary to plaintiff's argument, a continuance should not be granted solely on the grounds that the plaintiff has opted to represent himself. "When a litigant is appearing in propria persona, he is entitled to the same, but no greater, consideration than other litigants and attorneys [citations]. Further, the in propria persona litigant is held to the same restrictive rules of procedure as an attorney [citation]. [Fn. omitted.]"[11]

In sum, plaintiff was bound by the same deadlines as any other litigant. At the August 11, 1995, hearing, plaintiff appeared without filing oppositions to defendants' demurrers and unprepared to present oral argument. Plaintiff also failed to provide the court sufficient cause to continue the hearing. Even if another court would have been more lenient to a litigant facing the same complex issues and formidable opponents, we cannot conclude that the trial court abused its discretion in denying plaintiff's motion for continuance.

5. Disqualification of Trial Judge

Plaintiff claims the court erred in denying his motion for disqualification of the trial judge.

As defendants were filing their demurrers to the third amended complaint, plaintiff filed a motion to disqualify Judge Stephen Cunnison on the ground that he

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[11] *Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 638-639, see also *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 129-130.

was biased or prejudiced against plaintiff as an in propria persona litigant. After considering the matter, Judge E. Michael Kaiser denied plaintiff's motion primarily on the ground that the motion lacked merit.

Defendants contend that Judge Kaiser's denial of plaintiff's motion to disqualify Judge Cunnison is a nonappealable order. Code of Civil Procedure section 170.3, subdivision (d) provides the following: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal. . . . " A petition for writ of mandate is a party's exclusive means of challenging a court's disqualification decision.[12]

Here, plaintiff filed a petition for writ of mandate. On August 3, 1995, we denied plaintiff's petition. Plaintiff cannot complain again on appeal.

Nevertheless, in his reply brief, plaintiff argues that he was denied his due process right to an impartial judge. Even if we construe plaintiff's contention as a due process claim, we conclude such claim lacks merit.[13]

On procedural grounds, plaintiff contends that Judge Kaiser should have disqualified Judge Cunnison as a matter of law for failing to verify his answer. Code of Civil Procedure section 170.3, subdivision (c)(3) allows the court to file a written verified answer to plaintiff's motion. Subdivision (c)(4) of the same provision states

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[12] *People v. Webb* (1993) 6 Cal.4th 494, 522-523; *People v. Hull* (1991) 1 Cal.4th 266, 275.

[13] See *People v. Mayfield* (1997) 14 Cal.4th 668, 811; *People v. Brown* (1993) 6 Cal.4th 322, 336.

that the judge's failure to respond to the motion will be deemed as consent to his disqualification. In response to plaintiff's motion, Judge Cunnison submitted an answer denying the allegations contained in plaintiff's motion. Judge Cunnison also submitted, in addition to a memorandum of points and authorities, a verification and declaration under penalty of perjury. Judge Cunnison's supporting papers amply satisfy the statutory requirement.[14]

On the merits of his claim, plaintiff contends that Judge Kaiser should have disqualified Judge Cunnison on the ground of bias or prejudice. In his statement of disqualification, plaintiff primarily complains about the court's impatient remarks and unfavorable rulings. For instance, plaintiff states that during the hearing on his application for a temporary restraining order, Judge Cunnison, while speaking in an agitated and condescending tone, admonished plaintiff to not regurgitate the law as presented in his application and supporting papers. Plaintiff accused Judge Cunnison, in denying the application, of failing to read his papers in a meaningful manner. During another instance, the court, after granting plaintiff more than double the allotted time to file an amended complaint, explained that it would consider plaintiff's future requests for a continuance with a "jaundiced eye."

Although actual bias is not required, plaintiff must show that a reasonable person, viewing the facts or comments in context, would entertain doubts concerning the

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[14] See *People v. Mayfield, supra,* 14 Cal.4th at page 811.

judge's impartiality.[15] While the court's comments reasonably may be interpreted as a reluctance to grant repeated continuances, a refusal to afford plaintiff special treatment based on his in propria persona status, and a desire for judicial efficiency, they do not indicate a bias or prejudice against plaintiff. Furthermore, adverse rulings do not provide grounds for disqualification. We conclude that a reasonable person would not have interpreted the court's comments or decisions as arising out of a bias or prejudice against plaintiff.

Because plaintiff failed to show bias, we reject his claim that Judge Kaiser erred in denying his motion for disqualification as well as any due process claim. We need not address defendants' argument that plaintiff's motion to disqualify Judge Cunnison was untimely.

## 6. Demurrers

### A. Standard of Review

In reviewing a trial court's order of dismissal after an order sustaining a demurrer, we determine de novo whether the complaint states a cause of action as a matter of law.[16] We assume as true all material facts properly pled.[17] We uphold the court's order if the complaint fails

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[15] *Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.

[16] *Crowley v. Katleman* (1994) 8 Cal.4th 666, 672; *Montclair Parkowners Assoc. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.

[17] *Montclair Parkowners Assoc. v. City of Montclair, supra,* 76 Cal.App.4th at page 790.

to state a cause of action under any possible legal theory.[18]

Although we apply de novo review to the court's decision to sustain a demurrer, we review for an abuse of discretion the trial court's decision denying leave to amend.[19] Denying leave to amend constitutes an abuse of discretion if the plaintiff shows a reasonable probability that any defect was curable by amendment.[20]

B. Title 42 United States Code Section 1983 Claim

Plaintiff's complaint consists of several causes of action under Title 42 United States Code section 1983 ("section 1983"). In his third amended complaint, plaintiff alleged that District and other defendants deprived, or conspired to deprive, plaintiff of various constitutional rights, including his freedom of speech and freedom of assembly.

Specifically, in his third cause of action, plaintiff alleged that, District and other defendants repeatedly subjected him to various disciplinary measures in retaliation for his outspoken opposition to District's vocational drafting program and response to faculty grievances. In addition to his third cause of action, in his fifth and twentieth causes of action, plaintiff recounted specific instances involving violations of his constitutional rights.

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[18] *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 219.

[19] *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.

[20] *Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at page 967.

In his 15th through 20th causes of action, plaintiff alleged that District and other defendants discriminated, or conspired to discriminate, against plaintiff by restricting his teaching assignments and schedule, and denying him seniority, rank, tenure, and other work-related rights and privileges. Other causes of action in plaintiff's complaint also allude to constitutional violations without reference to section 1983.

Plaintiff's allegations in his subsequent complaints were substantially similar to the allegations in his third amended complaint. Plaintiff's sixth and seventh amended complaints, however, included additional causes of action addressing District or District employees' action in prompting students to file grievances against plaintiff. Plaintiff's seventh amended complaint was modified to include only the causes of actions pertinent to the named defendants.

In response to plaintiff's allegations, District and other defendants raised several defenses to plaintiff's section 1983 claim in their demurrers. The trial court sustained demurrers to the third amended complaint as to District, District officials, RCOE, Attorneys, and Keenan. The court later sustained District employees' demurrer to plaintiff's sixth and seventh amended complaints.

1. Proper Claim Under Section 1983

In its demurrer to plaintiff's third amended complaint, District and District officials argued that plaintiff failed to state a proper claim under section 1983.

In his opening brief, plaintiff explains that, although he alleged over 20 causes of action in his complaints, given the opportunity, he would amend his complaint to assert only two causes of actions, namely, one claim under section 1983 and one claim for negligence. Under his section 1983 claim, plaintiff claims that District, District officials, Attorneys, Keenan, and Lapp deprived him of his property and liberty interests without due process, subjected him to unfair treatment and disciplinary action, and changed the terms, conditions, and privileges of his employment because he exercised his right to free speech. Plaintiff also claims that State, RCOE, and other District officials acquiesced in, or deliberately endorsed, the above wrongful acts.

Preliminarily, we note that, although some of plaintiff's causes of action are defective as written, they may be amenable to amendment.[21] For instance, in his complaints and even in his opening brief, plaintiff alleged that defendants discriminated against him in the terms, conditions, and privileges of his employment. Usually, the term "discrimination" connotes a specific constitutional harm under the Equal Protection Clause of the Fourteenth Amendment. In claiming a violation of the equal protection clause, a plaintiff must demonstrate that he or she is a member of a protected class.[22] Insofar as plaintiff is alleging an equal protection violation, his allegations fail to state a cause of action. If, however, plaintiff

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[21] *Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at page 967.

[22] See, e.g., *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802.

is alleging the retaliatory deprivation of certain rights and privileges, his complaint can be amended to incorporate such allegations in his section 1983 claim.

We turn now to the question of whether plaintiff's allegations, that defendants retaliated against him and deprived him of various job-related rights and privileges based on his opposition to the vocational drafting program, constituted a proper claim under section 1983.

Employer retaliation for an employee's exercise of his or her right to free speech or expression is a common claim under section 1983. Specific rules apply in such cases. "To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing [himself or herself] on this matter must not be outweighed by any injury the speech could cause to ' "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." ' [Citations.]"[23] As discussed in the section on qualified immunity below, because plaintiff's speech involved a matter of public concern, and because the employee's interest was not outweighed by any injury to the interest of his employer, plaintiff's allegations stated a claim under section 1983 sufficient to survive defendant's demurrer.

Nevertheless, District argues that any harm suffered by plaintiff did not rise to the level of a constitutional violation. District argues that plaintiff, although never terminated nor demoted, only complained concerning his

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[23] *Waters v. Churchill* (1994) 511 U.S. 661, 668; quoting *Connick v. Myers* (1983) 461 U.S. 138, 142.

teaching assignments and working conditions. District also argues that plaintiff failed to establish that the alleged constitutional violations caused any actual injury.

Plaintiff can recover damages for actual injury caused by the deprivation of his constitutional rights. "[W]hen [section] 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts."[24] Plaintiffs cannot recover solely for a violation of abstract rights without proof of actual injury.[25] However, as with damages in tort, compensatory damages recovered for a constitutional deprivation may include impairment of reputation and emotional distress.[26] Emotional distress must be measured by certain elements, including emotional pain, humiliation, personal indignity, and embarrassment.[27]

Generally, causation and the amount of damages are questions for the jury. Plaintiff's complaint sufficiently alleged that District and other defendants subjected him to oppressive working conditions as a result of his criticisms of District's program and administration. Plaintiff's complaint also alleged that, defendant's conduct caused plaintiff, in addition to the deprivation of various benefits

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[24] *Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 306.

[25] *Memphis Community School Dist. v. Stachura, supra,* 477 U.S. at pages 308-310.

[26] *Memphis Community School Dist. v. Stachura, supra,* 477 U.S. at page 307.

[27] *Hobson v. Wilson* (D.C. Cir. 1984) 737 F.2d 1, 61-62.

of employment, the impairment of his reputation, humiliation, and mental anguish and suffering.

We conclude that plaintiff's allegations were sufficient to state a cause of action under section 1983.

2. Proper Defendants

District argues that it and its officials are not "persons" subject to suit for retrospective relief under section 1983.

Section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

Although local governmental entities are "persons" under section 1983,[28] states and state officials acting in their official capacities are not.[29] The question, therefore, is whether a school district and its related entities are state agencies for purposes of section 1983.

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[28] *Monell v. New York City Dept. of Social Services* (1978) 436 U.S. 658, 690-691.

[29] *Will v. Michigan Dept. of State Police* (1989) 491 U.S. 58, 71.

In support of its argument, District relies on *Belanger v. Madera Unified School District.*[30] In *Belanger,* however, the Ninth Circuit addressed only the question of whether a school district was an arm of the state, and, thereby, entitled to immunity under the Eleventh Amendment of the United States Constitution. The Eleventh Amendment, however, has no application in state courts.[31]

Nevertheless, this court addressed the exact question in our recent case, *Kirchmann v. Lake Elsinore Unified School District.*[32] In *Kirchmann,* based on various criteria, including that state's beneficial ownership of school district funds and other property, we held that the school district shared the state's immunity from suit under section 1983.[33]

School district officials acting in their official capacities also are immune from suit under section 1983. A lawsuit against the school district official in his or her official capacity is essentially a suit against the school district itself.[34] Naming the entity and naming an official in his or her official capacity as an agent for the entity are

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[30] *Belanger v. Madera Unified School District* (9th Cir. 1992) 963 F.2d 248, 254.

[31] *Hilton v. South Carolina Public Railways Comm'n.* (1991) 502 U.S. 197, 204-205; *Will v. Michigan Dept. of State Police, supra,* 491 U.S. at pages 63-64.

[32] *Kirchmann v. Lake Elsinore Unified School District* (2000) 83 Cal.App.4th 1098.

[33] *Kirchmann v. Lake Elsinore Unified School Dist., supra,* 83 Cal.App.4th at page 1115.

[34] See *Will v. Michigan Dept. of State Police, supra,* 491 U.S. at page 71; see also *Brandon v. Holt* (1985) 469 U.S. 464, 471-472.

merely two ways of pleading the same action.[35] Even a judgment obtained against a state official or a school district official in his or her official capacity indirectly would result in some state fiscal impact.[36] Therefore, as a natural extension of our holding in *Kirchmann*, the school district official in his or her official capacity is not a "person" subject to suit under section 1983.

However, a school district official in his or her personal or individual capacity is a "person" for section 1983 purposes. "Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law."[37] A personal-capacity defendant represents only himself or herself, not the governmental entity.[38] Although an official in his or her personal capacity may assert qualified immunity and other defenses, as will be discussed below, they are "persons" subject to suit under section 1983.

In sum, we conclude that District and District officials acting within their official capacity are not "persons" for purposes of section 1983 claims. District officials acting in their personal capacities, on the other

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[35] See *Will v. Michigan Dept. of State Police, supra,* 491 U.S. at p. 71, citing *Kentucky v. Graham* (1985) 473 U.S. 159, 165-166 and *Monell v. New York City Dept. of Social Services, supra,* 436 U.S. at page 690, fn. 55.

[36] See *Brandon v. Holt, supra,* 469 U.S. at page 472; *Kirchmann v. Lake Elsinore Unified School Dist., supra,* 83 Cal.App.4th at page 1109.

[37] *Hafer v. Melo* (1991) 502 U.S. 21, 25; see also *Kentucky v. Graham, supra,* 473 U.S. at page 165; *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 350.

[38] *Hafer v. Melo, supra,* 502 U.S. at page 26.

hand, are "persons" subject to suit under section 1983. The trial court properly sustained the demurrer only as to District and District officials in their official capacities.

3. Qualified Immunity

Alternatively, District claims that District officials were entitled to qualified immunity. District argues: "the allegations clearly establishes that to the extent that appellant has alleged any specific conduct or lack thereof by the individual defendants, that such conduct or omission were [*sic*] not of the nature that a reasonable official would have believed were [*sic*] unlawful."

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[39] " 'Clearly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . ' [Citations.]"[40] Under preexisting federal law, the unlawfulness of the challenged action must be apparent.[41] Generally, whether the

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[39] *Harlow v. Fitzgerald* (1982) 457 U.S. 800, 818.

[40] *Wilson v. Layne* (1999) 526 U.S. 603, 614-615.

[41] *Wilson v. Layne, supra,* 526 U.S. at page 615; *Anderson v. Creighton* (1987) 483 U.S. 635, 640.

right was clearly established at the time is a question of law that is reviewed de novo on appeal.[42]

The Supreme Court's decision in *Pickering v. Board of Education*[43] governs adverse employment actions taken in retaliation for an employee's protected speech.[44] Under *Pickering*, the court first considers whether the employee's speech is protected – i.e., whether it involves a matter of public concern.[45] The court next weighs the countervailing interests of the employee and the employer.[46] Based on our analysis below, we conclude that, in assuming the truth of plaintiff's allegations, the right exercised by plaintiff in speaking out against District's college curriculum and administration was clearly established at the time of the alleged retaliatory acts.

A public employee has a right to speak on issues of public importance without the threat of negative employment action.[47] This well-established right is an outgrowth of the constitutional principle that public officials may not deprive a person of governmental benefits because of that person's protected speech.[48]

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[42] *Elder v. Holloway* (1994) 510 U.S. 510, 516, citing *Mitchell v. Forsyth* (1985) 472 U.S. 511, 528 and *Harlow v. Fitzgerald, supra,* 457 U.S. at page 818.

[43] *Pickering v. Board of Education* (1968) 391 U.S. 563.

[44] *Biggs v. Best, Best & Krieger* (1999) 189 F.3d 989, 994; see also *Crawford-El v. Britton* (1998) 523 U.S. 574, 592-593.

[45] *Biggs v. Best, Best & Krieger, supra,* 189 F.3d at page 994.

[46] *Biggs v. Best, Best & Krieger, supra,* 189 F.3d at page 994.

[47] *Hyland v. Wonder* (9th Cir. 1997) 117 F.3d 405, 410, citing *Pickering v. Board of Educ., supra,* 391 U.S. at page 574.

[48] *Hyland v. Wonder, supra,* 117 F.3d at page 410.

In *Pickering,* the board of education dismissed a high school teacher for sending a letter to a local newspaper criticizing the school officials in dealing with past proposals to raise school revenues. In the letter, the plaintiff primarily criticized the board's allocation of school funds between academic and athletic programs. In evaluating plaintiff's speech, the court noted, "[c]ertainly, an accusation that too much money is being spent on athletics by the administrators of the school system . . . cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between [the plaintiff] and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest."[49] After determining that the plaintiff's interest in free speech outweighed any interest of the school administration in limiting a teacher's speech, the court held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[50]

In *Peacock v. Duval,*[51] the Ninth Circuit addressed a similar factual situation. There, the plaintiff, a tenured professor of surgery and head of the surgery department, opposed proposed changes in the system for allocating funds received for professional services provided in the clinical departments. The plaintiff criticized the manner

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[49] *Pickering v. Board of Educ., supra,* 391 U.S. at page 571.

[50] *Pickering v. Board of Educ., supra,* 391 U.S. at page 574.

[51] *Peacock v. Duval* (1982) 694 F.2d 644.

in which the university funded and administered its medical program. In response to the plaintiff's vocal opposition, plaintiff was dismissed from his position as the head of the department. After the plaintiff challenged his dismissal in a public statement, he also was suspended from his position as professor of surgery. In addressing district court's assessment of the plaintiff's speech, the court stated, "[t]here is no factual dispute as to the content of [the plaintiff's] speech, nor can there be any doubt that much of that speech dealt with subjects of public importance. Because at least some of [the plaintiff's] words and writings concern questions of policy relating to the administration of a public medical school, his speech clearly transcends mere academic bickering. [Citations.] [Fn. omitted.]"[52]

In another Ninth Circuit case, *Anderson v. Central Point School District No. 6*,[53] the plaintiff, a teacher-coach was suspended for writing a letter to the school board concerning his proposal for restructuring the school's athletic program. Before writing the letter, the plaintiff spoke at an open meeting held to discuss the athletic program. The district superintendent later rescinded the plaintiff's suspension.

In *Anderson*, the court provided the general test that, to determine whether the employee's speech involves a matter of public concern, the court must consider, in light of the whole record, the content, form, and context of the

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[52] *Peacock v. Duval, supra*, 694 F.2d at page 648.

[53] *Anderson v. Central Point School District No. 6* (9th Cir. 1984) 746 F.2d 505.

statement.[54] The plaintiff's public letter addressed the school's athletic program, which was the very subject discussed at the school board's meeting. In applying the above test, the court concluded that the letter clearly addressed a matter of public concern.[55]

Similarly, in this case, the content, form, and context of plaintiff's statements reveal that his speech addressed a matter of public concern. During a meeting with vocational drafting instructors, plaintiff voiced opposition against the college's vocational drafting program. After his first disciplinary memorandum of reprimand, plaintiff continued to speak out against the program and against District's reaction to plaintiff's opposition. In an open letter to District Board, plaintiff criticized District's reasons for its retaliatory action. As a result of plaintiff's outspoken opposition, plaintiff was placed on administrative leave, stripped of his seniority and tenure, and forced to teach remedial mathematics.

Plaintiff alleged that, as a tenured faculty member and president of District Academic Senate, he criticized District for misleading students by classifying its vocational drafting program as an engineering program primarily designed to provide introductory coursework for transfer students. Based on his allegations, a student who takes the course with the intent to transfer to another college or university would discover that his or her community college units were nontransferable. Plaintiff also

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[54] *Anderson v. Central Point School Dist. No. 6, supra,* 746 F.2d at page 507.

[55] *Anderson v. Central Point School Dist. No. 6, supra,* 746 F.2d at page 507.

alleged that he informed his employer that he was neither credentialed nor qualified to teach vocational drafting classes. Thus, the courses would not only fail to meet a transfer student's expectations, but also would be taught by a less-than-qualified instructor. Certainly, an educational institution cannot hold itself out to the public as providing instruction on a subject that it does not in fact teach.

At the time the retaliatory acts began in 1989, it was clearly established that a public college could not base its adverse employment decisions on plaintiff's speech regarding matters of public concern.[56] Under the circumstances in this case, the proper classification of an academic program and the college's manner of responding to faculty complaints concerning the program were matters of public concern.[57]

After determining that the speech addressed a matter of public concern, we must weigh the employee's interest in exercising his right to free speech against the employer's interest in efficiently providing public services.[58] "Although we recognize the necessity for the efficient functioning of a public university [citation], such efficiency cannot be purchased at the expense of stifling free and unhindered debate on fundamental education issues."[59]

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[56] See *Pickering v. Board of Educ., supra,* 391 U.S. at page 574; *Peacock v. Duval, supra,* 694 F.2d at pages 647 648.

[57] See *Anderson v. Central Point School Dist. No. 6, supra,* 746 F.2d at page 507; *Peacock v. Duval, supra,* 694 F.2d at page 648.

[58] *Biggs v. Best, Best & Krieger, supra,* 189 F.3d at page 994.

[59] *Peacock v. Duval, supra,* 694 F.2d at page 647.

Defendants made no showing to establish that plaintiff's speech disrupted the employer's work environment beyond any incidental impact.[60] There is no indication that plaintiff's criticism of the vocational drafting program interfered with his work environment, personnel relationships, or plaintiff's job performance.[61] There is also no indication that plaintiff's subsequent teaching reassignments, his temporary suspensions, and other negative employment action were the result of anything other than plaintiff's criticism of District's vocational drafting program and administration. Thus, District officials have failed to establish their entitlement to qualified immunity.[62] Upon remand, defendants certainly are not foreclosed from raising arguments concerning any disruptive impact of plaintiff's speech or other justification for their employment decisions.[63] At this point, however, there is no evidence to show that any state's interest outweighed plaintiff's interest in exercising his right to free speech.

Accordingly, we conclude that the defense of qualified immunity provided no grounds for sustaining defendants' demurrer.

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[60] See *Keyser v. Sacramento City Unified School Dist.* (9th Cir. 2001) 238 F.3d 1132, 1137.

[61] *Rankin v. McPherson* (1987) 483 U.S. 378, 388.

[62] *Collins v. Jordan* (9th Cir. 1997) 110 F.3d 1363, 1369.

[63] *Peacock v. Duval, supra,* 694 F.2d at page 648, footnote 4.

4. Immunity under Government Code section 820.2

District claims that immunity under Government Code section 820.2 for discretionary acts by public employees applied to plaintiff's section 1983 claims. Relying on well-established authority to the contrary, we disagree.

As one court simply stated: "State statutory immunity provisions do not apply to federal civil rights actions."[64] Indeed, proper construction of federal statutes and the supremacy clause forbid permitting state immunity statutes to control civil rights actions under section 1983.[65] Immunity is a question of federal law.[66] Even if the federal civil rights claim is raised in state courts, federal law overrides conflicting state immunity statutes.[67] A state statute granting immunity to public officials, without regard to certain considerations such as whether the claim was brought against the officials in their personal capacity and whether their conduct violated clearly established federal law, cannot govern section 1983 analysis.

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[64] *Guillory v. Orange County* (9th Cir. 1984) 731 F.2d 1379, 1382.

[65] *Guillory v. Orange County, supra,* 731 F.2d at page 1382, citing *Martinez v. California* (1980) 444 U.S. 277, 284, fn. 8.

[66] *Howlett v. Rose* (1990) 496 U.S. 356, 377.

[67] *Howlett v. Rose, supra,* 496 U.S. at pages 377-378; see *Martinez v. State of California* (1980) 444 U.S. 277, 284; see also *Felder v. Casey* (1988) 487 U.S. 131, 153; accord, *County of Los Angeles v. Superior Court* (*Schonert* ) (1999) 21 Cal.4th 292, 300; *County of Los Angeles v. Superior Court* (*Valentin*) (2000) 78 Cal.App.4th 212, 227-231.

Therefore, Government Code section 820.2 offers District officials no shield in defending against plaintiff's section 1983 claim.

5. Administrative Remedies

Under three separate headings, District claims that plaintiff failed to exhaust administrative remedies before resorting to section 1983. District contends that plaintiff's section 1983 claims were preempted by Public Employment Relations Board's exclusive jurisdiction under the California Educational Employment Relations Act, the administrative grievance procedures set forth in plaintiff's collective bargaining agreement, and other administrative procedures established under the Education Code. Although District relies on several cases, none of which supports its contention, two of the cited cases even note that the exhaustion doctrine does not apply to section 1983 actions.[68]

The United States Supreme Court " . . . has stated categorically that exhaustion is not a prerequisite to an action under [section] 1983. . . . "[69] Thus, absent expressed congressional intent, federal and state courts cannot require exhaustion of any alternative administrative or judicial remedies as a prerequisite of a section

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[68] *Bockover v. Perko* (1994) 28 Cal.App.4th 479, 491-492; *Logan v. Southern California Rapid Transit District* (1982) 136 Cal.App.3d 116, 124.

[69] *Patsy v. Board of Regents* (1982) 457 U.S. 496, 500-501; see also *Felder v. Casey, supra,* 487 U.S. 131, 146-150.

1983 suit.[70] Even if state legislatures establish comprehensive state administrative procedures, exhaustion of such procedures is not required before bringing a civil rights action under section 1983.[71] While states may prescribe the rules and procedures governing state court actions, states cannot "place conditions on the vindication of a federal right."[72] Here, District's efforts to apply the exhaustion doctrine to plaintiff's section 1983 fails.

D. [sic] Negligence

Plaintiff claims that District, RCOE, and certain State defendants acted negligently in supervising others under their control. Although he failed to specifically plead this cause of action, plaintiff claims that he would amend his complaint to include a cause of action for negligence under Government Code sections 815.2, subdivision (a) and 815.6.

As stated above, we review for an abuse of discretion the trial court's decision denying leave to amend.[73] "It is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility any

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[70] *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 336.

[71] *Brosterhous v. State Bar, supra,* 12 Cal.4th at page 337, see also *Zinermon v. Burch* (1990) 494 U.S. 113, 124 ("[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983.")

[72] *Felder v. Casey, supra,* 487 U.S. at page 147.

[73] *Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at page 967.

defect can be cured by amendment. [Citations.] A demurrer may be sustained without leave to amend where the nature of the defects and previous unsuccessful attempts to plead render it probable plaintiff cannot state a cause of action. [Citation.]"[74]

Unlike plaintiff's section 1983 claim, plaintiff's negligence claim is not a compilation of existing causes of action from his complaint. Apart from claiming tortious conduct as a basis for defendants' section 1983 liability, plaintiff made no allegations against the above defendants under general principles of negligence. Plaintiff fails to provide any authority for allowing him to amend his complaint by adding an entirely new cause of action.[75]

Furthermore, unlike a section 1983 claim, a state law claim of negligence against a public entity is subject to a wide array of state law defenses and immunities. The liability of the defendants, as governmental entities and officials, would be governed by the Government Tort Claims Act.[76] Additionally, workers' compensation provides an exclusive remedy to an employee for work-related injury caused by an employer's negligent or even willful conduct.[77] Thus, based on such defenses, plaintiff

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[74] *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 958-959.

[75] *Cooper v. Equity General Ins. Co.* (1990) 219 Cal.App.3d 1252, 1264.

[76] Government Code section 810 et seq.; *Keyes v. Santa Clara Valley Water Dist.* (1982) 128 Cal.App.3d 882, 885-886.

[77] *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1063, footnote 4; *Cole v. Fair Oaks Fire Prot. Dist.* (1987) 43 Cal.3d 148, 160.

cannot be able to state a cause of action for negligence that would survive demurrer.

Accordingly, we will not afford plaintiff an opportunity to amend his complaint to assert a cause of action for general negligence.

E. Specific Defendants

1. RCOE

Plaintiff contends the trial court erred in sustaining RCOE's demurrer. Although defendant, in his opening brief, does not address separately RCOE's demurrer, he claims his general discussion of the grounds presented in RCOE's demurrer precludes RCOE from arguing that plaintiff waived any appeal from the trial court's order sustaining the demurrer. Regardless of any waiver, our independent review of the record reveals that RCOE's dismissal was proper.

In its demurrer, RCOE claimed that plaintiff failed to state facts sufficient to constitute a cause of action. Plaintiff's complaint only contains allegations concerning RCOE in his third cause of action for civil conspiracy under section 1983.

Although a local governmental entity is a "person" subject to suit under section 1983, the entity cannot be held liable solely under a theory of respondeat superior.[78] In summarizing its decision in *Monell v. Department of*

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[78] *Monell v. Department of Social Services, supra,* 436 U.S. at pages 691-695; see *Board of County Com'rs of Bryan County, Okl. v. Brown* (1997) 520 U.S. 397, 403.

*Social Services,*[79] the Supreme Court stated: "We . . . recognized that a municipality may not be held liable under § 1983 solely because it employs a tortfeasor. Our conclusion rested partly on the language of § 1983 itself. In light of the statute's imposition of liability on one who 'subjects [a person], or causes [that person] to be subjected,' to a deprivation of federal rights, we concluded that it 'cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.' [Citation.] Our conclusion also rested upon the statute's legislative history. As stated in [*Pembaur v. Cincinnati* (1986) 475 U.S. 469, 479], 'while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*. . . .' We have consistently refused to hold municipalities liable under a theory of *respondeat superior.*"[80]

In this case, plaintiff alleged that Lapp was RCOE's agent or employee. Plaintiff essentially claimed that RCOE was liable for Lapp's participation in a conspiracy to deprive plaintiff of his constitutional rights. A claim based on vicarious liability is insufficient to state a cause of action against RCOE. Therefore, the trial court properly sustained RCOE's demurrer.

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[79] *Monell v. Department of Social Services, supra,* 436 U.S. 658.

[80] *Board of County Com'rs of Bryan County, Okl. v. Brown, supra,* 520 U.S. at page 403.

Furthermore, there is no indication in plaintiff's complaint that any decision or wrongdoing was attributable to RCOE or that RCOE was the "moving force" behind plaintiff's injury.[81] Because plaintiff fails to present a viable theory of liability upon which to base a cause of action against RCOE, the trial court also did not abuse its discretion in denying leave to amend.[82]

2. Attorneys

a. Statute of Limitations

In their demurrer to plaintiff's third amended complaint, Attorneys asserted that plaintiff's claim was barred by the one-year statute of limitations contained in Code of Civil Procedure section 340, subdivision (3).

"A general demurrer based on the statute of limitations is only permissible where the dates alleged in the complaint show that the action is barred by the statute of limitations. [Citation.] The running of the statute must appear 'clearly and affirmatively' from the dates alleged. It is not sufficient that the complaint *might* be barred. [Citation.] If the dates establishing the running of the statute of limitations do not clearly appear in the complaint, there is no ground for general demurrer. The proper remedy 'is to ascertain the factual basis of the

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[81] *Board of County Com'rs of Bryan County, Okl. v. Brown, supra,* 520 U.S. at page 404.

[82] *Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at page 967.

contention through discovery and, if necessary, file a motion for summary judgment. . . . ' "[83]

Plaintiff's third amended complaint alleged that, although the conspiracy may have started in 1989, "[t]he nature and extent of said conspiracy did not become manifest until the Fall of 1994." Plaintiff claims that defendants took part in a continuous course of conduct in retaliation for his statements concerning District's vocational drafting program and District's suppression of constitutional rights.

Specifically, plaintiff alleged that, on or about March 21, 1990, District retained Attorneys to conduct an investigation into plaintiff's accusations against District. Plaintiff also alleged that Attorneys "voluntarily entered an affirmative course of conduct affecting" plaintiff's interests, and that Attorneys "have continued to act, and do now continue to act, conspiratorially with [District and District officials], with the intent and purpose of injuring Plaintiff wrongfully." In response to plaintiff's written accusations against District, Attorneys assisted District in placing plaintiff on administrative leave in order to prevent plaintiff from attending the interim District Academic Senate meeting and opposing District's efforts to avoid an investigation into plaintiff's complaints concerning the vocational drafting program. In June of 1990, Attorneys also assisted District in filing reprimands against plaintiff.

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[83] *Roman v. County of Los Angeles* (2000) 85 Cal.App.4th 316, 324-325.

Although plaintiff did not mention Attorneys in reference to any challenged acts after 1990, plaintiff included several allegations concerning conduct by other defendants. Plaintiff alleged that, on August 26, 1993, District and other defendants reassigned plaintiff from teaching vocational drafting program to teaching only low-level mathematics. Plaintiff also alleged that, after that time, District and other defendants continued to retaliate against plaintiff by depriving him of other rights and benefits of his employment.

Plaintiff filed his original complaint on August 26, 1994. Based on the above allegations, we cannot conclude, as a matter of law, that plaintiff's complaint was barred by the one-year statute of limitations.

Although the last mention of Attorneys in plaintiff's third amended complaint involves conduct in 1990, other defendants may have continued to subject plaintiff to unlawful conduct. A participant in a civil conspiracy is liable not only for his or her own tortious conduct, but also the torts of his or her coconspirators within the scope of the conspiracy.[84] Based on plaintiff's allegations concerning Attorneys' participation in the conspiracy, irrespective of whether plaintiff will be able to prove a conspiracy among the parties, Attorneys cannot absolve themselves of all liability because they themselves were not personally involved in the subsequent acts.

Furthermore, plaintiff may be able to show a continuing violation. " 'To establish a continuing violation [a

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[84] *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.

plaintiff has] to show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during the [limitations] period." ' [Citations.] A continuing violation may thus be established not only by demonstrating a company wide policy or practice, but also by demonstrating a series of related acts against a single individual. [Citation.] In the latter instance, '[the] question . . . boils down to whether sufficient evidence supports a determination that the "alleged discriminatory acts are related closely enough to constitute a continuing violation." '"[85]

Here, plaintiff argues that District and other defendants participated in a continuous course of conduct to suppress plaintiff from exercising his freedom of speech and other constitutional rights. Plaintiff alleged that he was reprimanded for voicing opposition against District's vocational drafting program. Plaintiff alleged that he was placed on administrative leave to prevent him from continuing to voice opposition. As a result of speaking out against District, plaintiff was deprived of other work-related benefits. Plaintiff's allegations, therefore, indicate that all the actions taken against him may have been closely related.

Although the statute of limitations may preclude plaintiff's action if he fails to demonstrate a conspiracy among the parties or fails to establish a continuing

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[85] *Green v. Los Angeles County Superintendent* (1989) 883 F.2d 1472, 1480-1481.

violation, the complaint does not show clearly and affirmatively that the statutory period has expired.[86] Under the statute of limitations defense, therefore, Attorneys cannot show that plaintiff failed to state a cause of action. In so concluding, we need not address plaintiff's waiver argument under Government Code section 911.3.

b. Civil Code Section 1714.10

Attorneys also demurred on the ground that plaintiff's allegations against them were barred by plaintiff's failure to submit a verified petition to file a complaint against Attorneys for civil conspiracy under Civil Code section 1714.10. Attorneys argue that Civil Code section 1714.10 is not preempted by federal law because it merely sets forth a procedural rule to discourage frivolous suits against attorney defendants.

Under the supremacy clause of the federal Constitution, state courts may not apply state law that interferes with or frustrates a substantive federal right.[87] In exercising jurisdiction over a federal claim, however, states are entitled to establish neutral procedural rules of court administration that do not affect the ultimate outcome of the controversy.[88]

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[86] *Roman v. County of Los Angeles, supra,* 85 Cal.App.4th at pages 324-325.

[87] *Felder v. Casey, supra,* 487 U.S. at page 151; *County of Los Angeles v. Superior Court (Schonert), supra,* 21 Cal.4th at page 298.

[88] *Howlett v. Rose* (1990) 496 U.S. 356, 373; *County of Los Angeles v. Superior Court (Schonert), supra,* 21 Cal.4th at page 300.

In applying these principles, the Supreme Court has allowed states to apply their own statutes of limitations.[89] Although Congress did not establish time limitations for a section 1983 claim, "Congress did not intend to create a right enforceable in perpetuity."[90] Therefore, borrowing state statutes of limitations for section 1983 balances the interests of efficacy and restraint with the policy of enforcing federal rights.[91] Accordingly, neutral rules of decisions supplied by states are borrowed to assist in the enforcement of a federal remedy.[92]

By contrast, in *Felder v. Casey*,[93] the Supreme Court held that a Wisconsin's notice-of-claim statute did not apply to section 1983 cases. The court reasoned that the notice requirement under Wisconsin law imposed a burden on the exercise of a plaintiff's federal right.[94] The court further reasoned that such statutes frequently produce different outcomes depending on whether the claim is brought in federal or state court.[95] Therefore, the court held, "[a] state law that conditions that right of recovery upon compliance with a rule designed to minimize governmental liability, and that directs injured persons to seek redress in the first instance from the very targets of

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[89] *Wilson v. Garcia* (1985) 471 U.S. 261, 269-270.

[90] *Felder v. Casey, supra*, 487 U.S. at page 140.

[91] *Wilson v. Garcia, supra*, 471 U.S. at page 271.

[92] *Wilson v. Garcia, supra*, 471 U.S. at page 269; see also *Hardin v. Straub* (1989) 490 U.S. 536 and *Johnson v. Fankell* (1997) 520 U.S. 911.

[93] *Felder v. Casey, supra*, 487 U.S. 131.

[94] *Felder v. Casey, supra*, 487 U.S. at page 141.

[95] *Felder v. Casey, supra*, 487 U.S. at page 141.

the federal legislation, is inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law."[96]

In the Ninth Circuit case, *Harding v. Galceran*[97] one of the issues addressed by the court was whether California Government Code section 945.3, which prohibits the filing of a civil action against peace officers while criminal charges against the potential plaintiff were pending, applied to section 1983 claims. In applying the Supreme Court's decision in *Felder,* the court concluded that the state provision was contrary to the purposes of section 1983 and, therefore, violated the Supremacy Clause of the federal Constitution.[98]

The federal case, *Gordon v. Higgs*[99] is also persuasive. There, the court addressed the question of whether it lacked jurisdiction over the plaintiff's section 1983 claim as a result of the plaintiff's failure to comply with a Nevada law that required him first to submit a claim to a "Medical-Legal Screening Panel." The doctor defendant raised the Nevada provision as a defense in his motion to dismiss plaintiff's section 1983 claim. Relying on *Felder,* the court rejected the defense and denied the motion to dismiss.[100] The court reasoned, " . . . the plaintiff's claim is to redress an alleged violation of his Fourteenth Amendment due process right. We do not perceive any

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[96] *Felder v. Casey, supra,* 487 U.S. at page 153.

[97] *Harding v. Galceran* (1989) 889 F.2d 906.

[98] *Harding v. Galceran, supra,* 889 F.2d at page 908.

[99] *Gordon v. Higgs* (D. Nevada 1989) 716 F.Supp. 1351.

[100] *Gordon v. Higgs, supra,* 716 F.Supp. at page 1352.

deficiency in the federal civil rights law that necessitates the borrowing of Nevada's malpractice screening law in order to effectuate the remedial purposes underlying [section] 1983 in the context of an alleged due process deprivation."[101] The court, therefore, concluded that the Nevada provision did not apply to the plaintiff's section 1983 claim.[102]

This case involves a state statute that imposes a pre-filing requirement for civil conspiracy claims against attorney defendants. Civil Code section 1714.10 provides, in part: "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action. The court may allow the filing of a pleading claiming liability based upon such a civil conspiracy following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based."

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[101] *Gordon v. Higgs, supra,* 716 F.Supp. at page 1352.

[102] *Gordon v. Higgs, supra,* 716 F.Supp. at page 1352.

In enacting Civil Code section 1714.10, the state legislature intended to eliminate frivolous claims of conspiracy against attorney defendants.[103] "This statutory purpose is served by a construction that requires a prefiling procedure to determine whether the proposed conspiracy pleading is legally sufficient, and whether it is supported by a sufficient prima facie showing of facts to sustain a favorable decision if the evidence submitted by the petitioner is credited."[104]

Under Code of Civil Procedure section 1714.10, subdivision (b), a defendant may raise a plaintiff's failure to fulfill the prefiling requirement as a defense to any action for civil conspiracy. Therefore, a plaintiff's failure to comply with Civil Code section 1714.10 effectively precludes all civil conspiracy actions against attorney defendants, including lawsuits brought under section 1983. Statutory defenses, however, generally do not apply to lawsuits for violations of federal constitutional rights under section 1983.[105]

The prefiling requirement, like the notice-of-claim requirement, imposes an additional burden on the exercise of a federal right.[106] By conferring upon attorney defendants an affirmative defense, Civil Code section 1714.10 obligates the plaintiff to demonstrate compliance

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[103] *Evans v. Pillsbury, Madison & Sutro* (1998) 65 Cal.App.4th 599, 604.

[104] *Hung v. Wang* (1992) 8 Cal.App.4th 908, 931; see also *Devereaux v. Latham & Watkins* (1995) 32 Cal.App.4th 1571, 1582.

[105] See *Ellis v. City of San Diego* (1999) 176 F.3d 1183, 1191.

[106] *Felder v. Casey, supra,* 487 U.S. at page 141.

with the prefiling requirement.[107] Although plaintiffs are not required to bring a claim within a specific period of time against the very entities and persons Congress intended to subject to liability under civil rights legislation, the additional burden imposed by the prefiling requirement is nevertheless inconsistent with the remedial objectives of section 1983. Rather than a mere procedural rule, it creates a substantive condition that applies to civil conspiracy claims against attorney defendants.[108]

Additionally, unlike statutes of limitations, state statutes requiring the prefiling of certain claims are not necessary to the vindication of a federal right under section 1983.[109] Such requirements are not "in any sense indispensable prerequisites to litigation."[110]

Moreover, the state prefiling requirement invariably would produce different outcomes depending on whether the lawsuit was brought in federal or state court.[111] Such outcome-determinative laws must yield when plaintiffs assert a federal right in state courts.[112] In this case, applying the defense that plaintiff failed to comply with the prefiling requirement would effectively bar plaintiff's claim against Attorneys. We agree with plaintiff that this

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[107] *Felder v. Casey, supra,* 487 U.S. at page 144.

[108] See *Felder v. Casey, supra,* 487 U.S. at page 152.

[109] See *Felder v. Casey, supra,* 487 U.S. at page 140; *Gordon v. Higgs, supra,* 716 F.Supp. at page 1352.

[110] *Felder v. Casey, supra,* 487 U.S. at page 140; see also *Botefur v. City of Eagle Point, Oregon* (1993) 7 F.3d 152, 156.

[111] See *Felder v. Casey, supra,* 487 U.S. at pages 141, 152.

[112] *Felder v. Casey, supra,* 487 U.S. 141, 151.

is the type of outcome-determinative law that the Supreme Court in *Felder* prohibited.

Nevertheless, as stated above, Attorneys argue that Civil Code section 1714.10 is merely a procedural requirement for eliminating frivolous lawsuits. "A State may adopt neutral procedural rules to discourage frivolous litigation of all kinds, as long as those rules are not preempted by a valid federal law. A State may not, however, relieve congestion in its courts by declaring a whole category of federal claims to be frivolous. Until it has been proved that the claim has no merit, that judgment is not up to the States to make."[113] Not only is Civil Code section 1714 preempted by federal law by interfering with the vindication of a federal right, the state provision also effectively eliminates an entire category of claims. Although plaintiffs who bring such claims – section 1983 claims under a theory of civil conspiracy against attorney defendants – face various legal obstacles, such claims are not inherently frivolous. Thus, such category of claims should not be subjected to an additional requirement not imposed in federal courts for the purpose of avoiding frivolous or specious claims.[114]

We conclude that the state statutory defense set forth in Civil Code section 1714.10 does not apply to section 1983 actions. Accordingly, the trial court erred in sustaining the demurrer on the ground that plaintiff failed to comply with the prefiling requirement in Civil Code section 1714.10.

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[113] *Howlett v. Rose, supra,* 496 U.S. at page 380.

[114] See *Felder v. Casey, supra,* 487 U.S. 149-150.

3. Keenan

In his third amended complaint, plaintiff alleged that defendant Keenan conspired with District and other defendants "to conceal the nature and extent of said Defendants' conspiracies against Plaintiff by taking a leading role in approving or disapproving the tactical and strategic moves to be taken by said Defendants against Plaintiff." Plaintiff alleged that Keenan and other defendants filed a reprimand against Plaintiff for using school equipment to produce his open letter criticizing District. Plaintiff further alleged that Keenan and other defendants filed this and other reprimands against plaintiff to mask their true intent, which was to retaliate against him for exercising his right to free expression and restrict his future exercise of his rights.

On July 21, 1995, Keenan, the property and casualty administrator for RCOE and District, filed its demurrer to plaintiff's third amended complaint. In essence, Keenan asserted that plaintiff failed to state a cause of action against it.

In his opening brief and as discussed above, plaintiff claims that he stated a cause of action under section 1983 sufficient to survive demurrer. Plaintiff specifically claims that Keenan and other defendants deprived him of his constitutional rights based on his exercise of his right to free speech.

In its brief, Keenan argues that, because plaintiff neglected to address in his opening brief the issue of whether the court properly sustained the demurrer based on plaintiff's failure to state a cause of action, plaintiff

has waived his right to raise this issue on appeal. Keenan has failed to examine carefully plaintiff's brief. As stated above, plaintiff addressed this exact issue.

In addressing the substance of plaintiff's claim, Keenan, in one paragraph, argues that plaintiff's third amended complaint fails to state a cause of action for conspiracy because there were no allegations that Keenan had the requisite knowledge or intent to participate in the alleged conspiracy.

As discussed below, conspiracies require that the coconspirators have knowledge of the planned objective and the intent to accomplish that objective.[115] According to plaintiff's allegations, Keenan intended to retaliate against plaintiff for exercising his right to free speech. Keenan also filed reprimands and took a leading role in assisting District with its strategy in dealing with plaintiff. Based on his allegations, which could be amended to track more precisely the elements of a civil conspiracy, we cannot conclude that plaintiff failed to state a cause of action. We are not suggesting that Keenan is liable for conspiring with the other defendants to deprive plaintiff of his constitutional rights; nevertheless, sustaining the demurrer on grounds that plaintiff's third amended complaint failed to state a cause of action against Keenan was error.

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[115] *Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582.

7. Denial of Motion to Stay Proceedings

Plaintiff claims the trial court erred in denying District employees' motion to stay the proceedings pending plaintiff's appeal.

In October of 1996, District employees filed a motion to stay the proceedings. Plaintiff opposed the motion. Plaintiff's opposition to District official's motion below prevents him from raising any challenge on appeal.[116]

Moreover, the record indicates that District employees eventually withdrew their motion. The court never ruled on District Board's motion. Therefore, nothing remains to be challenged.

8. State's Motion for Summary Judgment

Plaintiff claims the trial court erred in granting summary judgment as to his sixth amended complaint in favor of the Academic Senate for California Community Colleges ("State Academic Senate") and two individual state defendants, Karen Grosz and Phil Hartley.

On May 1, 1996, State Academic Senate, State Board, Grosz, and Hartley filed a motion for summary judgment on the grounds that no evidence supported the only remaining allegations against Grosz and Hartley contained in his third cause of action, and, accordingly, no evidence supported plaintiff's allegations of State Academic Senate's vicarious liability. In support of their

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[116] *Bell v. American Title Ins. Co.* (1991) 226 Cal.App.3d 1589, 1602.

motion, State defendants submitted Grosz and Hartley's signed declarations denying any connection to, or any knowledge of, any investigative team.

Plaintiff filed his opposition to State defendant's motion for summary judgment. In his opposition, plaintiff claimed that Grosz and Hartley's declarations were merely self-serving statements. Plaintiff submitted a "disputation of defendants' submitted statement of undisputed material fact" and his own signed declaration discussing Grosz and Hartley's involvement. Plaintiff also submitted several exhibits, including letters, memorandums, news articles, and the minutes for various meetings.

In their reply, State defendants claimed that plaintiff failed to refute the fact that Grosz and Hartley were not involved in an investigative team concerning plaintiff and took no action that was harmful to plaintiff. State defendant also objected to plaintiff's evidence on the grounds of relevancy, hearsay, and lack of foundation.

On June 21, 1996, the trial court granted State defendant's motion for summary judgment as to the remaining State defendants, except State Board. The court also sustained defendant's evidentiary objections.

In reviewing a summary judgment, we independently review the papers submitted by the parties to determine whether a triable issue as to any material fact exists and whether the moving party is entitled to judgment as a matter of law.[117] "Summary judgment is a

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[117] *Galanty v. Paul Revere Life Ins. Co.* (2000) 23 Cal.4th 368, 374.

severe remedy which is to be granted with caution. [Citation.]"[118] In evaluating the declarations filed to support or oppose the motion for summary judgment, we strictly construe the moving party's declarations and liberally construe those submitted by the opposing party.[119]

The only remaining claim against State officials was plaintiff's third cause of action under section 1983 for civil conspiracy. "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors."[120] The elements of civil conspiracy are the formation and operation of the conspiracy, a wrongful act done in the furtherance of the conspiracy, and the resulting damage to the plaintiff.[121]

State primarily contested the first element, namely, that State officials were involved in a conspiracy. The

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[118] *Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1094.

[119] *Paper Savers, Inc. v. Naca* [sic], *supra*, 51 Cal.App.4th at page 1094.

[120] *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at pages 510-511.

[121] *Applied Equipment Corp. v. Litton Saudi Arabia Ltd., supra*, 7 Cal.4th at page 511.

threshold requirement for a civil conspiracy is the formation of a conspiracy by two or more persons who have agreed on a common plan to commit a civil wrong.[122] The conspirators must have knowledge of the planned wrongdoing and the intent to aid in its commission.[123] Knowledge and intent may be inferred from the circumstances, including the nature of the acts, the relationship among the parties, and the interest of the conspirators.[124]

As stated above, plaintiff submitted his declaration and various exhibits to show Grosz and Hartley's involvement in the conspiracy. Although State defendants objected to plaintiff's evidence on various grounds, their vague objections to plaintiff's evidence were inadequate to secure an evidentiary ruling in their favor.[125] Rule 345 of the California Rules of Court provide: "A written objection to evidence in support of or in opposition to a motion for summary judgment shall state the page and line number of the document to which objection is made, and state the grounds of objection with the same specificity as a motion to strike evidence made at trial." Thus, state defendants' objection lacked the specificity required for a proper evidentiary ruling on plaintiff's evidence,

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[122] *Kidron v. Movie Acquisition Corp.*, supra [sic], 40 Cal.App.4th at page 1582.

[123] *Kidron v. Movie Acquisition Corp., supra,* 40 Cal.App.4th at page 1582.

[124] *Kidron v. Movie Acquisition Corp., supra,* 40 Cal.App.4th at page 1582.

[125] California Rules of Court, rule 345; *City of Long Beach v. Farmers & Merchants Bank* (2000) 81 Cal.App.4th 780, 783.

which consisted of an eight-page declaration and 23 pages of exhibits.

Even assuming the court properly sustained state defendants' evidentiary objections, some of plaintiff's evidence, including parts of his declaration, would not have been excluded on the grounds asserted. In any case, defendants bear the initial burden of establishing a strong showing entitling them to judgment as a matter of law.[126]

Code of Civil Procedure section 437c, subdivision (e) provides: "If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment shall not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment, *except that summary judgment may be denied in the discretion of the court, where the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact; or where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof.*" (Emphasis added.) Under this provision, the defendant's conclusory affirmation or denials may be adequate to establish the defendant's state of mind as a matter of law.[127]

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[126] *Rincon v. Burbank Unified School Dist.* (1986) 178 Cal.App.3d 949, 955.

[127] *KOVR-TV, Inc. v. Superior Court* (1995) 31 Cal.App.4th 1023, 1031; see also Weil & Brown, California Practice Guide: Civil Procedure Before Trial (The Rutter Group 2001) paragraph 10:202, page 10-65.

Here, the only evidence submitted with state's motion for summary judgment was Grosz and Hartley's half-page declarations. In their declarations, both Grosz and Hartley admitted that they visited plaintiff's campus. Both, however, stated that the purpose of their trip was nothing more than a routine visit. Grosz also stated: "I was not part of any 'investigative team' regarding Mr. Anthony Vasek while visiting Mt. San Jacinto Community College nor was I invited to be part of any such 'team'. I did not enter into any conspiracy against Mr. Vasek nor did I take any action or make any statements with respect to him or his position at Mt. San Jacinto Community College during the course of said visit." In his declaration, Hartley followed suit: "At no time prior to, during, or shortly after said visit to Mt. San Jacinto Community College was there any suggestion that this presentation supplanted the efforts of any 'investigative team' regarding Mr. Anthony Vasek. I was not a member of any such team, I have no knowledge of any such team being established, nor did I undertake to undermine the efforts of any such team."

In considering plaintiff's deposition, much of which was relevant and based on his personal knowledge, we cannot find that defendants, by their conclusory denials, demonstrated that no triable issue of material fact existed. According to his deposition, in March of 1990, plaintiff, as President of District Academic Senate, had a telephone conversation with Ted Hamilton, the President of the Faculty Association of California Community Colleges, concerning his problems with District. After this conversation, plaintiff and the other faculty members

voted to invite Hamilton and other state officials, including Grosz and Hartley, to visit the college and investigate plaintiff's allegations. However, after plaintiff wrote his open letter of criticism, the members of District Academic Senate, including plaintiff, were substituted with interim members. District then placed plaintiff on administrative leave. During his absence, the interim District Academic Senate voted to change the planned visit by the state officials. As decided by the interim District Academic Senates, Grosz and Hartley visited the campus on May 4, 1990. The visit, however, did not serve the original purpose of investigating plaintiff's allegations.

In their declarations, Grosz and Hartley, without further explanation, state that their Spring of 1990 visit to the campus was simply a routine visit. Defendants' evidence consists of mere conclusions without substantial factual support.[128] Plaintiff's evidence, however, suggests that Grosz and Hartley agreed with District to terminate all efforts to conduct the planned investigation. We cannot conclude, therefore, that their self-serving declarations were sufficient to support a judgment in their favor as a matter of law. Although we are not suggesting that plaintiff's evidence affirmatively established a conspiracy, we conclude that material, disputed facts existed as to Grosz and Hartley's involvement, if any, in a conspiracy to deprive plaintiff of his civil rights.

In his brief, plaintiff merely argues that the court erred in granting summary judgment because his allegations had merit. In claiming that plaintiff waived any

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[128] See *Snider v. Snider* (1962) 200 Cal.App.2d 741, 751.

substantive challenge to the court's ruling, State responds solely to plaintiff's alternative contention that the court erred in denying his motion to continue the hearing under Code of Civil Procedure section 437c, subdivision (h). Nevertheless, based on this court's independent review of the pleadings, as required, we conclude that the trial court erred in finding no triable issue of material fact.

Despite the court's error, reversal of the court's order granting the summary judgment as to State Academic Senate is unnecessary.[129] As previously stated, states are not "persons" subject to suit under section 1983.[130] Consequently, plaintiff cannot maintain a section 1983 suit against any State entity defendant.

In sum, we reverse the trial court's order granting summary judgment as to Grosz and Hartley, and affirm the court's order as to State Academic Senate.

9. State's Motion for Judgment on the Pleadings

Plaintiff claims the trial court erred in granting State Board's motion for judgment on the pleadings.

On January 2, 1997, State Board filed a motion for judgment on the pleadings on various grounds including that plaintiff's seventh amended complaint failed to state a cause of action. Specifically, State Board argued that,

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[129] See California Constitution, Article VI, section 13; Code of Civil Procedure section 475; *South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal.App.4th 861, 907-908.

[130] *Will v. Michigan Dept. of State Police, supra,* 491 U.S. at page 71.

because, according to plaintiff's allegations, State Board was liable under a theory of vicarious liability for failing to exercise supervisory control over District and District officials, the elimination of all causes of action against such defendants necessarily requires the dismissal of all remaining causes of action against State Board.

The trial court granted State Board's motion on January 27, 1997.

In reviewing the trial court's decision to grant a motion for judgment on the pleadings, we apply the same standard of review as with the decision to sustain a demurrer.[131] We exercise independent judgment in determining whether the complaint states a cause of action as a matter of law.[132]

Although not on any basis submitted by State Board, the complaint fails to state a cause of action against it because, as a State entity, State Board is not a "person" within the meaning of section 1983.[133] Furthermore, respondeat superior liability, or vicarious liability, does not apply to governmental entities in the context of a section 1983 claim.[134] Therefore, as a matter of law, plaintiff cannot maintain, directly or under a theory of

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[131] *McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144.

[132] *McCutchen v. City of Montclair, supra,* 73 Cal.App.4th at page 1144; *Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1448.

[133] See footnotes 55 and 56.

[134] *Monell v. Department of Social Services, supra,* 436 U.S. at pages 691-695; see generally *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106.

imputed or vicarious liability, a section 1983 claim against State Board.

For this reason, we affirm the trial court's order granting State Board's motion for judgment on the pleadings.

## 10. Lapp's Motion to Strike

Plaintiff claims the trial court erred in granting Lapp's motion to strike under Code of Civil Procedure section 425.16.

Before we evaluate the court's decision, we note that, in his brief, defendant Lapp also argues that plaintiff's complaint was barred by the applicable statute of limitations. Lapp's dismissal from plaintiff's case, however, was based not on the statute of limitations defense, but as a result of his successful motion to strike under Code of Civil Procedure section 425.16. Accordingly, Lapp has no basis for asserting the statute of limitations defense on appeal.

We turn now to a discussion of plaintiff's claim against Lapp and Lapp's motion to strike. In the third cause of action in his seventh amended complaint, plaintiff alleged that, after a meeting with drafting instructors, Lapp misrepresented to the instructors, and later to District and RCOE personnel, that plaintiff was "incompetent, unqualified and incapable" of leading District's engineering program. Lapp also questioned plaintiff's continued employment with District.

Lapp later assisted in the filing of a disciplinary memorandum against plaintiff. The memorandum stated:

" 'On April 3 was a meeting of the 2 + 2 Articulation Committee, scheduled for 10:30 a.m. You <Plaintiff> apparently invited high school and ROP instructors to be there at 9:00 a.m. primarily for the purpose of discussing your philosophy of engineering and drafting programs. When Royce Lapp, Dean Caldwell and Ivan Hinerman arrived at 10:30, the scheduled starting time for the meeting, you continued to criticize [District's] program, commenting on the need to reorganize the program, the fact that you did not consider it to be engineering level instruction, and the need for more administrative support. In regard to this latter issue, you also noted that instructors in other sciences were also dissatisfied with administrative support. . . . <F>urther instances of unprofessional conduct in your dealings with your supervisors, administrators, faculty members, or others, will result in disciplinary action.' " Plaintiff alleged that Lapp's conduct was intended to deter plaintiff from speaking out against District.

In addition to filing a demurrer and a motion to strike on other grounds, Lapp invoked the procedural remedy set forth in Code of Civil Procedure section 425.16. After considering plaintiff's opposition and oral arguments, the trial court granted Lapp's motion to strike under Code of Civil Procedure section 425.16 and later dismissed him from the case.

Assuming Code of Civil Procedure section 425.16 applies as a defense to a section 1983 claim, we conclude that plaintiff's claim does not fall within the ambit of the statute.

In enacting Code of Civil Procedure section 425.16, the Legislature established a procedural remedy for the expeditious resolution to SLAPP (Strategic Lawsuit Against Public Participation) suits.[135] "SLAPP suits have been defined as ' . . . "civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." [Citation.]' They are brought, not to vindicate a legal right, but rather to interfere with the defendant's ability to pursue his or her interests. Characteristically, the SLAPP suit lacks merit; it will achieve its objective if it depletes defendant's resources or energy. The aim is not to win the lawsuit but to detract the defendant from his or her objective, which is adverse to the plaintiff."[136] Code of Civil Procedure section 425.16 serves to expose and dismiss such meritless claims.[137]

In determining whether a trial court properly granted a motion to strike under Code of Civil Procedure section 425.16, we apply de novo review.[138] The defendant bears the burden of establishing a prima facie

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[135] *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees* (1999) 69 Cal.App.4th 1057, 1063; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 645.

[136] *Church of Scientology v. Wollersheim, supra,* 42 Cal.App.4th at page 645.

[137] *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 819.

[138] *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 721, disapproved on other grounds in *Briggs v. Eden Council for Hope and Opportunity, supra,* 19 Cal.4th at page 1123, footnote 10; *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695.

case.[139] "The defendant may meet this burden by showing the act which forms the basis for the plaintiff's cause of action was a written or oral statement made before a legislative, executive, or judicial proceeding, or such a statement in connection with an issue under consideration or review by a legislative, executive, or judicial body, or that such a statement was made in a place open to the public or a public forum in connection with an issue of public interest."[140] After defendant makes the requisite showing, the burden shifts to the plaintiff to establish, by producing sufficient admissible evidence, the probability of prevailing on the merits of his claim.[141] The plaintiff's "burden does not arise unless the claim is one falling within the ambit of the statute."[142]

Lapp argues that his "involvement in this matter was in connection with an issue under consideration and review by an official proceeding, authorized by law, of an issue under consideration, of public interest." One of the cases cited by Lapp in support of his argument is *Dixon v. Superior Court*.[143]

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[139] *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at page 820.

[140] *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at page 810.

[141] *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567.

[142] *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at page 819.

[143] *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733.

In *Dixon*, the defendant, an archaeologist and professor emeritus of anthropology at California State University at Long Beach (CSULB), criticized an archaeological report prepared by Scientific Resource Surveys, Inc. (SRS) for CSULB that concluded that CSULB's development of a Japanese garden and museum would cause no adverse effects on the archaeological and historical resources in Puvunga, a site that previously was added to the National Register of Historic Places. Several years later, when CSULB commissioned an environmental study, which resulted in a negative declaration, of the proposed development of a strip mall at Puvunga, the defendant claimed that the environmental study relied on the earlier archaeological report. The defendant sent letters to various officials, accusing SRS of unprofessional secrecy and claiming that SRS's report was filled with errors and fell below professional standards. Eventually, based on the defendant's outspoken opposition, CSULB ceased to use SRS's services.

SRS filed a lawsuit against the defendant for various causes of action, including intentional and negligent interference with contractual relations and prospective economic advantage. The defendant moved to strike SRS's complaint under Code of Civil Procedure section 425.16.

In determining whether SRS's complaint constituted a SLAPP suit, the appellate court noted that there was no dispute that the proposed development of the Puvunga site and proceedings under the California Environmental

Quality Act (CEQA) were matters of public concern.[144] The court concluded that, because the defendant's criticisms were made during the public review period contemplated under CEQA after the issuance of a negative declaration, his statements were made in connection with the CEQA proceedings.[145] The court also concluded that, because SRS could not establish a probability of prevailing at trial, the lower court erred in denying the defendant's motion under Code of Civil Procedure section 425.16.

Although Lapp argues that Dixon presents a "remarkably similar set of circumstances," we cannot agree with his assessment. Although Lapp describes his speech as involving a matter of "public education" or the "expansion of a public program affecting students in the County of Riverside, as to the course of their education," his speech had no rational connection to the vocational drafting program itself.[146] Rather, it was merely a personal attack on a private individual. Lapp accused plaintiff for being incompetent and lacking professionalism. Moreover, Lapp's criticisms may not have been made in furtherance of his constitutional right of free speech. "[I]n determining whether a cause of action falls within the scope of the statute, we hold that the Legislature intended to include only those suits that are based upon

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[144] *Dixon v. Superior Court, supra,* 30 Cal.App.4th at page 742.

[145] *Dixon v. Superior Court, supra,* 30 Cal.App.4th at page 743.

[146] See *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at page 822.

acts that are primarily in furtherance of a person's constitutional right of free speech, i.e., acts which advance or promote that right."[147] Plaintiff alleged that any criticisms made concerning his professionalism were made as a pretext to disguise Lapp's motive of retaliating against plaintiff and interfering with his exercise of his constitutional rights. Therefore, Lapp's statements were made neither in furtherance of the exercise of his right of free speech nor in connection with a public issue or an issue of public interest.[148]

Furthermore, it is uncertain whether Lapp's criticisms of plaintiff's unprofessional conduct and his admonition to plaintiff for speaking out against District's vocational drafting program were statements made in connection with an issue under consideration in an official proceeding.[149] Lapp fails to establish that plaintiff's meeting with other vocational drafting instructors or any other specific proceeding involved in this case constituted an official proceeding authorized by law within the meaning of the statute.[150] Also, his criticism of plaintiff's unprofessional conduct was not made in connection with any issue under consideration. Plaintiff's competency and

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[147] See *Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers* (1996) 49 Cal.App.4th 1591, 1601, disapproved on other grounds in *Briggs v. Eden Council for Hope & Opportunity, supra,* 19 Cal.4th at page 1123, footnote 10.

[148] Code of Civil Procedure section 425.16, subdivision (e)(4).

[149] Code of Civil Procedure section 425.16, subdivision (e)(2).

[150] *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284-285.

professionalism is a subject wholly unrelated to the vocational drafting program. We cannot conclude, therefore, that Lapp has adequately established that his statements were made in connection with an issue under consideration in an official proceeding authorized by law.

Even if we were to assume that plaintiff made this initial showing under Code of Civil Procedure section 425.16, subdivision (e), plaintiff's claim still falls outside the scheme of the statute. "When considering a section 425.16 motion, a court must consider the actual objective of the suit and grant the motion if the true goal is to interfere with and burden the defendant's exercise of his free speech and petition rights."[151] In other words, a court must decide whether the lawsuit is in fact a SLAPP suit.

The record indicates that plaintiff's suit was not brought to interfere with Lapp's right to free speech. In bringing his lawsuit against Lapp and the other defendants, plaintiff did not seek to silence Lapp, but to obtain relief under section 1983. His goal was to win the lawsuit.[152] To that end, plaintiff filed a lengthy complaint that contained numerous causes of actions, only a few of which involved defendant Lapp. Plaintiff alleged that defendants including state and local entities and officials conspired against him by using various measures, including the filing of disciplinary letters, placing plaintiff on

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[151] *Foothills Townhome Assn. v. Christiansen, supra,* 65 Cal.App.4th at page 696.

[152] *Foothills Townhome Assn. v. Christiansen, supra,* 65 Cal.App.4th at page 696.

administrative leave, and depriving him of certain benefits of his employment, in retaliation for his outspoken opposition, or to deter future opposition, against District. Like the defendant in *Dixon*, plaintiff in this case exercised his right of free speech by speaking out against what he observed to be a lack of academic or professional integrity at public college.

Allowing Lapp to invoke the protections of Code of Civil Procedure section 425.16 for his attempt to suppress plaintiff's speech contradicts the Legislature's express intent. "The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process."[153] In this case, while plaintiff acted in furtherance of his right of free speech, Lapp attempted to use the procedural remedy under Code of Civil Procedure section 425.16 to chill plaintiff's exercise of his constitutional rights. No reasonable reading of the statute supports this paradoxical result. We simply cannot find that plaintiff's lawsuit fell within the ambit of the statute.

## 11. Disposition

We dismiss the appeal as to defendants Union and Chancellor. We affirm the trial court's judgments of dismissal based on the following orders: the court's order sustaining District's demurrer as to District and District officials acting in their official capacity; the court's order

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[153] Code of Civil Procedure section 425.16, subdivision (a).

sustaining RCOE's demurrer; the court's order granting summary judgment as to State Academic Senate; and the court's order granting State Board's motion for judgment on the pleadings. We reverse, however, the court's judgments of dismissal based on other decisions, as follows: the court's order sustaining District's demurrer as to District officials, including District Board members, acting in their personal capacities; the court's order sustaining Attorneys' demurrer; the court's order sustaining Keenan's demurrer; the court's order granting summary judgment as to individual State defendants, Grosz and Hartley, acting in their personal capacities; and the court's order granting Lapp's motion to strike under Code of Civil Procedure section 425.16. Plaintiff shall recover his costs on appeal.

NOT TO BE PUBLISHED

s/Gaut
J.

We concur:

s/McKinster
Acting P. J.

s/Ward
J.

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

| | |
|---|---|
| ANTHONY G. VASEK,<br>Plaintiff and Appellant,<br>v.<br>MT. SAN JACINTO COLLEGE DISTRICT et al.,<br>Defendants and Respondents. | E017343 and E020125<br>(Super.Ct.No. 254638)<br>The County of Riverside |
| ANTHONY G. VASEK,<br>Plaintiff and Appellant,<br>v.<br>ACADEMIC SENATE FOR CALIFORNIA COMMUNITY COLLEGES et al.,<br>Defendants and Respondents. | E019009<br>(Super.Ct.No. 254638)<br>The County of Riverside<br>(Filed Oct. 24, 2001) |

THE COURT

Appellant's petition for rehearing is DENIED.

GAUT
Acting Presiding Justice

cc: [Attached list omitted in printing]

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ATTORNEYS FOR DEFENDANT
MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT (a public entity) (erroneously sued and served as MT. SAN JACINTO COLLEGE DISTRICT); MT. SAN JACINTO COLLEGE DISTRICT BOARD OF TRUSTEES; MT. SAN JACINTO COLLEGE DISTRICT ACADEMIC SENATE; BOBBY AVILA; DAVID BOOKIN; CLAIRE BROYLES; BENTON CALDWELL; BERNARD J. CARRIGAN; ALICE CUTTING; BENJAMIN DAVIS; WILLIAM FARRELL; ELGIN HUSHBECK; MARCIA L. KRULL; RICHARD H. LOWE; ROY B. MASON; ROBERT McNERNEY; ANN MOTTE; JOHN MOTTE; STEVE NARIN; KAZI NIZAMUDDIN; SHAHLA RAZAVI; ROBERT G. ROCKWELL; DON ROHRABACHER; GWENDOLYN SCHLANGE; ROBERT SCHLEY; JOHN SEED; RICHARD SISK; WAYNE STUART; WAYNE WEBB (employees of a public entity)

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF RIVERSIDE
CENTRAL DISTRICT – RIVERSIDE

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| ANTHONY G. VASEK,<br>Plaintiff,<br>vs.<br>MT. SAN JACINTO COLLEGE DISTRICT, et al.,<br>Defendant. | CASE No.: 254638<br>ORDER OF DISMISSAL RE: PLAINTIFF'S THIRD AMENDED COMPLAINT<br>(Filed Sep. 5, 1995) |

On August 11, 1995, in Department "7" of this court, the Honorable Stephen Cunnison, Judge Presiding, this court heard the demurrers and related motions brought by the following defendants pertaining to the Third Amended Complaint of plaintiff in propria persona ANTHONY G. VASEK:

1) Defendants MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT (a public entity) (erroneously sued and served as MT. SAN JACINTO COLLEGE DISTRICT); MT. SAN JACINTO COLLEGE DISTRICT BOARD OF TRUSTEES; MT. SAN JACINTO COLLEGE DISTRICT ACADEMIC SENATE; BOBBY AVILA; DAVID BOOKIN; CLAIRE BROYLES; BENTON CALDWELL; BERNARD J. CARRIGAN; ALICE CUTTING; BENJAMIN DAVIS; WILLIAM FARRELL; ELGIN HUSHBECK; MARCIA L. KRULL; RICHARD H. LOWE; ROY B. MASON; ROBERT McNERNEY; ANN MOTTE; JOHN MOTTE; STEVE NARIN; KAZI NIZAMUDDIN; SHAHLA RAZAVI; ROBERT G. ROCKWELL; DON ROHRABACHER; GWENDOLYN SCHLANGE; ROBERT SCHLEY; JOHN SEED; RICHARD SISK; WAYNE STUART; WAYNE WEBB (employees of a public entity) (hereinafter collectively referred to as "the District defendants");

2) Defendants [sic] Riverside County Office of Education;

3) Defendants Atkinson, Andelson, Loya, Ruud & Romo, Ronald C. Rudd [sic] and Sherry Gordon (hereinafter collectively referred to as "the Atkinson, Andelson defendants"; and

4) Defendant Keenan & Associates.

The following parties (hereinafter collectively referred to as "the parties") appeared:

1) Liebman, Reiner & Walsh, by Kenneth A. Jew, appeared on behalf of the District defendants;

2) Charles C. McKenna appeared on behalf of defendant Riverside County Office of Education;

3) Sherry Gordon appeared on behalf of the Atkinson, Andelson defendants;

4) Joe Gibbons appeared on behalf of defendant Keenan & Associates; and

5) Plaintiff appeared in propria persona.

During the hearing on August 11, 1995, the parties stipulated, and IT IS HEREBY ORDERED, as follows:

1) The parties stipulated to vacate the continuance previously ordered by the court as to the demurrers of the Atkinson, Andelson defendants and defendant Keenan & Associates to plaintiff's Third Amended Complaint, which were previously continued to September 7, 1995. The parties stipulated to advance the hearings of the Atkinson, Andelson defendants and defendant Keenan & Associates' demurrers to August 11, 1995. The parties stipulated that the two demurrers could be heard on the merits on August 11, 1995 and that plaintiff waived any and all objections regarding any defects in notice or service as to the demurrers of the Atkinson, Andelson defendants and defendant Keenan & Associates.

2) The parties stipulated that plaintiff opposes the demurrers of the District defendants, defendant Riverside

County Office of Education, the Atkinson, Andelson defendants, and defendant Keenan & Associates, as well as the special motion to strike plaintiff's fourth and thirteenth causes of action under Code of Civil Procedure ("CCP") section 425.16 brought by the District defendants, and that plaintiff disagrees as to the merits of such motions. However, the parties stipulated that the demurrers of 1) the District defendants, 2) defendant Riverside County Office of Education, 3) the Atkinson, Andelson defendants, and 4) defendant Keenan & Associates, as well as the District defendants' special motion to strike the fourth and thirteenth causes of action under CCP section 425.16, shall be sustained/granted in their entirety by the court without leave to amend as to plaintiff's entire Third Amended Complaint and that plaintiff's Third Amended Complaint shall be dismissed with prejudice as to the moving defendants.

Plaintiff's consent to judgment was given merely to facilitate and expedite an appeal following the Court's adverse determination on the critical issues of disqualification and plaintiff's request for more time to prepare his opposition papers. Notwithstanding plaintiff's consent to judgment, plaintiff's right to appeal is preserved by express agreement of all of the parties.

The parties stipulated that the District defendants' 1) Motion to Dismiss for violation of court order and delayed service and 2) Motion to Strike portions of plaintiff's Third Amended Complaint under CCP section 436 shall be taken off-calendar. The parties stipulated that the requests for sanctions by the District and joining defendants in the Motion to Dismiss and Special Motion to Strike under CCP section 425.16 shall be denied.

3) The parties stipulated that plaintiff may submit into the court's record the following:

A. Letters dated January 10, 1995 from Kenneth Jew to plaintiff and January 13, 1995 from plaintiff to Kenneth Jew;

B. Declarations 1) by plaintiff dated July 17, 1995, 2) by Shirley A. Norrell (2 pages), 3) Joseph A. Goodson (2 pages), and 4) Laurie J. LeNormand (2 pages); and

C. A marshal's notice dated March 10, 1995 pertaining to plaintiff's service of defendant Benton Caldwell.

4) The parties stipulated that the District defendants and defendant Richard Lowe will take their motion to quash service of defendant Lowe, scheduled to be heard on August 18, 1995, off-calendar, that defendant Lowe will join in and be incorporated in the District defendants' demurrer to the Third Amended Complaint and Special Motion to Strike the fourth and thirteenth causes of action under CCP section 425.16, that defendant Lowe's joinder and incorporation in such motions shall constitute a general appearance by him in this lawsuit, and that plaintiff waives any and all objections with respect to notice and service of defendant Lowe's joinder and incorporation into such motions.

5) The parties stipulated that defendants Claire Broyles, Marcia Krull, and Benjamin Davis will also join in and be incorporated in the District defendants' demurrer to the Third Amended Complaint and Special Motion to Strike the fourth and thirteenth causes of action under

CCP section 425.16, that defendant Broyles, Krull, and Davis' joinder and incorporation in such motions shall constitute a general appearance by them in this lawsuit, and that plaintiff waives any and all objections with respect to notice and service of defendants Broyles, Krull, and Davis' joinder and incorporation into such motions.

6) The parties stipulated to meet and confer in preparing the order of dismissal and that each of the parties or their representatives will approve the proposed order as to form and content prior to its submission to the court for signature.

7) The parties stipulated to waive costs pertaining to the dismissal and any judgment resulting from such dismissal.

8) The parties stipulate to waive notice as to the August 11, 1995 hearing.

Approved as to form and content.

DATED: 8-29-95

/s/ Anthony G. Vasek
ANTHONY G. VASEK,
In Pro Per
Attorney for Plaintiff

DATED: August 28, 1995

LIEBMAN, REINER, & WALSH
A Professional Corporation

By: /s/ Kenneth A. Jew
DENNIS J. WALSH, Esq.
KENNETH A. JEW, Esq.
Attorneys for defendants
MT. SAN JACINTO COMMUNITY
COLLEGE DISTRICT (a public entity)
(erroneously sued and served as

MT. SAN JACINTO COLLEGE DISTRICT); MT. SAN JACINTO COLLEGE DISTRICT BOARD OF TRUSTEES; MT. SAN JACINTO COLLEGE DISTRICT ACADEMIC SENATE; BOBBY AVILA; DAVID BOOKIN; CLAIRE BROYLES; BENTON CALDWELL; BERNARD J. CARRIGAN; ALICE CUTTING; BENJAMIN DAVIS; WILLIAM FARRELL; ELGIN HUSHBECK; MARCIA L. KRULL; RICHARD H. LOWE; ROY B. MASON; ROBERT McNERNEY; ANN MOTTE; JOHN MOTTE; STEVE NARIN; KAZI NIZAMUDDIN; SHAHLA RAZAVI; ROBERT G. ROCKWELL; DON ROHRABACHER; GWENDOLYN SCHLANGE; ROBERT SCHLEY; JOHN SEED; RICHARD SISK; WAYNE STUART; WAYNE WEBB (employees of a public entity)

DATED: 8/29/95 /s/ Joseph T. Gibbons, Jr.
JOSEPH T. GIBBONS, JR., Esq.
Attorney for Defendant
KEENAN & ASSOCIATES

DATED: 8/29/95 ATKINSON, ANDELSON, LOYA, RUUD & ROMO

By: /s/ Sherry G. Gordon
RONALD C. RUUD, Esq.
SHERRY G. GORDON, Esq.
Attorneys for Defendants
ATKINSON, ANDELSON, LOYA, RUUD & ROMO, RONALD C. RUUD AND SHERRY G. GORDON

DATED: 8/29/95 LYNBERG & WATKINS

By: /s/ Dana John McCune
DANA JOHN McCUNE, Esq.
CHARLES C. McKENNA
Esq.
Attorneys for Defendant
RIVERSIDE COUNTY
OFFICE OF EDUCATION
(inadvertently sued as
RIVERSIDE COUNTY
BOARD OF EDUCATION)

The court hereby ORDERS as stipulated to above, and IT IS HEREBY ORDERED THAT the demurrers of 1) the District defendants, 2) defendant Riverside County Office of Education, 3) the Atkinson, Andelson defendants, and 4) defendant Keenan & Associates, as well as the District defendants' special motion to strike the fourth and thirteenth causes of action under CCP section 425.16, shall be sustained/granted in their entirety without leave to amend as to plaintiff's entire Third amended Complaint.

Accordingly, IT IS FURTHER HEREBY ORDERED THAT plaintiff's Third Amended Complaint is DISMISSED in its entirety, with prejudice, as to 1) the District defendants, 2) defendant Riverside County Office of Education, 3) the Atkinson, Andelson defendants, and 4) defendant Keenan & Associates.

IT IS SO ORDERED.

DATED: SEP 5 1995

/s/ Stephen D. Cunnison
JUDGE OF THE
RIVERSIDE COUNTY
SUPERIOR COURT

Court of Appeal, Fourth Appellate District, Division Two
– Nos. E017343/E019009
**S102022**

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

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ANTHONY G. VASEK, Plaintiff and Appellant,

v.

MT. SAN JACINTO COLLEGE DISTRICT et al.,
Defendants and Respondents.

AND COMPANION CASE.

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(Filed Jan. 16, 2002)

Petition for review DENIED.

The request for an order directing publication of the opinion is denied.

GEORGE
Chief Justice